No. 17-1107 *** CAPITAL CASE ***	
Title:	**Mike Carpenter, Interim Warden, Petitioner** **v.** **Patrick Dwayne Murphy**
Docketed:	February 7, 2018
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(07-7068, 15-7041)
Decision Date:	November 9, 2017
Rehearing Denied:	November 9, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 06 2018	Petition for a writ of certiorari filed. (Response due March 9, 2018) **Petition** **Certificate of Word Count** **Proof of Service**
Feb 26 2018	Motion to extend the time to file a response from March 9, 2018 to April 9, 2018, submitted to The Clerk. **Main Document**
Feb 28 2018	Motion to extend the time to file a response is granted and the time is extended to and including April 9, 2018.
Mar 09 2018	Brief amici curiae of Environmental Federation of Oklahoma, Inc., et al. filed. **Proof of Service** **Certificate of Word Count** **Main Document**
Mar 09 2018	Brief amicus curiae of Oklahoma Independent Petroleum Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 09 2018	Brief amicus curiae of United States of America filed. **Certificate of Word Count** **Main Document**
Apr 09 2018	Brief of respondent Patrick Dwayne Murphy in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 23 2018	Reply of petitioner Terry Royal, Warden filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 24 2018	DISTRIBUTED for Conference of 5/10/2018.

May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 21 2018	Petition GRANTED. Justice Gorsuch took no part in the consideration or decision of this petition.
May 23 2018	Motion of Terry Royal, Warden for an extension of time not accepted for filing. (June 20, 2018)
Jun 20 2018	Motion to extend the time to file the joint appendix and the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended and including July 23, 2018. The time to file respondent's brief on the merits is extended to and including September 7, 2018.
Jun 20 2018	Motion for an extension of time filed. **Main Document**
Jul 23 2018	Brief of petitioner Mike Carpenter, Interim Warden filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 23 2018	Joint appendix (2 volumes) filed. **Main Document** **Main Document** **Proof of Service**
Jul 25 2018	Letter of July 23, 2018, received from counsel for the petitioner. **Main Document**
Jul 30 2018	Brief amici curiae of International Municipal Lawyers Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Brief amicus curiae of Oklahoma Independent Petroleum Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Brief amici curiae of Oklahoma Sheriffs' Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Brief amici curiae of States of Nebraska, Kansas, Louisiana, Michigan, Montana, South Dakota, Texas, Utah, Wyoming, and Paul R. LePage, Governor of Maine filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Brief amici curiae of Environmental Federation of Oklahoma, Inc., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Brief amicus curiae of United States of America filed.

	Proof of Service **Main Document**
Aug 27 2018	Motion for a further extension of time filed. **Main Document**
Aug 27 2018	Response of Mike Carpenter, Interim Warden to motion not accepted for filing. (To be resubmitted - August 29, 2018)
Aug 27 2018	Response to motion from petitioner Mike Carpenter, Interim Warden filed. **Main Document**
Aug 29 2018	Motion for a further extension of time to file respondent's brief on the merits granted in part, and the time is extended to and including September 19, 2018.
Sep 19 2018	Brief of respondent Patrick Dwayne Murphy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 26 2018	Brief amici curiae of David Boren, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 26 2018	Brief amicus curiae of National Congress of American Indians filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 26 2018	Brief amici curiae of Historians, Legal Scholars, and Cherokee Nation filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Sep 26 2018	Brief amicus curiae of Muscogee (Creek) Nation filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 26 2018	Brief amici curiae of Former United States Attorneys filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 26 2018	Joint motion of respondent and Muscogee (Creek) Nation for leave for Muscogee (Creek) Nation to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Sep 26 2018	Brief amici curiae of National Indigenous Women's Resource Center, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	SET FOR ARGUMENT ON Tuesday, November 27, 2018

Oct 09 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Gorsuch and Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 15 2018	Record requested from the U.S.C.A. 10th Circuit.
Oct 19 2018	CIRCULATED
Oct 19 2018	Reply of petitioner Mike Carpenter, Interim Warden filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 22 2018	Record received from the U.S.C.A. 10th Circuit is electronic and located on PACER, with the exception of 5 Boxes of Pleadings.
Oct 26 2018	Joint motion of respondent and Muscogee (Creek) Nation for leave for Muscogee (Creek) Nation to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion.
Nov 27 2018	Argued. For petitioner: Lisa S. Blatt, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Ian H. Gershengorn, Washington, D. C.; and Riyaz A. Kanji, Ann Arbor, Mich. (for Muscogee (Creek) Nation, as amicus curiae.)
Dec 04 2018	The parties, the Solicitor General, and the Muscogee (Creek) Nation are directed to file supplemental briefs addressing the following two questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a). The briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2018. Reply briefs, not to exceed 3,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, January 11, 2019. (Justice Gorsuch, recused in this case).
Dec 28 2018	Supplemental brief of Muscogee (Creek) Nation as amicus curiae filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 28 2018	Supplemental brief of respondent Patrick Dwayne Murphy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 28 2018	Supplemental brief of United States of America as amicus curiae filed. (Distributed)

	Certificate of Word Count **Main Document**
Dec 28 2018	Supplemental brief of petitioner Mike Carpenter, Interim Warden filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2019	Supplemental reply brief of amicus curiae Muscogee (Creek) Nation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2019	Supplemental reply brief of amicus curiae United States of America filed. (Distributed) **Proof of Service** **Main Document**
Jan 11 2019	Supplemental reply brief of respondent Patrick Dwayne Murphy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2019	Supplemental reply brief of petitioner Mike Carpenter, Interim Warden filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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No. 17-

IN THE

Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

PARTIES TO THE PROCEEDING

Petitioner Terry Royal is the Warden of the Oklahoma State Penitentiary. Petitioner was the respondent in the district court and the appellee in the Tenth Circuit.

Respondent Patrick Murphy was the petitioner in the district court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 875 F.3d 896 (10th Cir. 2017). App. 1a. The district court's opinion is reported at *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). App. 134a. The opinion of the Oklahoma Court of Criminal Appeals is reported at *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005). App. 203a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on August 8, 2017. The court denied rehearing and issued an amended opinion on November 9, 2017. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1153(a) of Title 18, United States Code, provides, in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Section 1151 of Title 18, United States Code, provides, in relevant part: "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

STATEMENT

In a decision that strikes at the core of Oklahoma's identity and sovereignty, the Tenth Circuit held that the State lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. This holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions.

The former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Whether an area this large and populous is an Indian reservation warrants certiorari. But there is more. Litigants have invoked the decision below to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. The decision thus threatens to effectively redraw the map of Oklahoma.

Prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*. Civil litigants are using the decision to expand tribal jurisdiction over non-members. All of this creates intolerable uncertainty for over 1.8 million Oklahomans who may now live on an Indian reservation, with all the civil, criminal, and regulatory consequences that could flow from that determination.

Chief Judge Tymkovich stated below that "this challenging and interesting case makes a good candidate for Supreme Court review" and that "this may be the rare case where the Supreme Court wishes" to revisit the governing standard for the disestablishment of Indian reservations. App. 232a. The United States joined Oklahoma's petition for rehearing en banc, both because the "panel erred, and because this is a case of exceptional importance" with "significant and wide-ranging implications for law enforcement." U.S. Br. in Supp. of Reh'g at 1–2 (filed Oct. 10, 2017).

The Tenth Circuit believed that this Court's precedents foreclosed the court from fully accounting for Oklahoma's unique history. As Chief Judge Tymkovich observed, "the square peg" of this Court's Indian reservation decisions "is ill suited for the round hole of Oklahoma statehood." App. 232a. But Oklahoma's history is dispositive here. Oklahoma was formed by the merger of Oklahoma Territory to the west and Indian Territory to the east. The latter encompassed the land of all Five Tribes, which covered the eastern half of present-day Oklahoma. To prepare the Indian Territory for statehood, Congress systematically dismantled tribal governments and their communal ownership of lands. The birth of our forty-sixth State marked the culmination of a two-decade legislative campaign to dissolve the Five Tribes' communal territories.

If not corrected, the decision below could result in the largest abrogation of state sovereignty by a federal court in American history. It has been universally understood since statehood that the historical boundaries of the Five Tribes' territories are not reservations. Since its founding, the State has prosecuted offenses committed by or against Indians on lands within the former Indian Territory. Meanwhile, nei-

ther the federal government nor the tribes have prosecuted such crimes under the theory that the land is an Indian reservation. Because the decision below casts that century of precedent aside and has already unleashed a torrent of litigation and confusion, this Court's immediate attention is warranted.

A. Historical background

The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations form their own unique chapter in American history. "These tribes were collectively known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 1 (1999).

The Five Tribes once inhabited land stretching across what is now Georgia, most of Alabama, and the Florida panhandle. In the 1830s, the United States forced the Five Tribes to abandon their homes and migrate west to the designated "Indian Territory" in present-day Oklahoma. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (1972 ed.). Unlike other tribes, for whom the United States set aside federal lands as reservations where the Indians would live under federal patronage, *see, e.g.*, Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224; Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, the Five Tribes received patents for land in fee simple. The United States promised the Five Tribes that as long as they occupied their lands, they would never be subject to the laws of any State or Territory, and their land would never be made part of any State or

Territory. Treaty with the Creek Tribe of Indians art. XIV, Mar. 24, 1832, 7 Stat. 366, 368.[1]

After the Civil War, in response to the tribe's alliance with the Confederacy, the United States forced the Creek Nation to cede the entire western half of its land. The United States obtained similar cessions from the other four tribes. Parts of those lands were used for settlement of other tribes, but the rest—which became Oklahoma Territory—was eventually opened to non-Indian settlement beginning with the historic land run of 1889. Angie Debo, *And Still the Waters Run* 6 (1940). The remainder of the Five Tribes' land maintained its status as Indian Territory.

Congressional promises of perpetual independence and seclusion could not withstand the relentless tide of western settlement. Railroads, burgeoning coal and cattle industries, and the settlement of the Western frontier facilitated migration of non-Indians onto tribal lands. Non-Indians could not legally own land in the Five Tribes' territories, since communal title to that land was vested in the tribes, and even Indians enjoyed only rights of use or occupation. *See Barnett v. Way*, 119 P. 418, 419 (Okla. 1911). But that did not stop the encroachment. Within two generations after their arrival west of the Mississippi, Indians were a slim majority of the population in Creek territory, and just 28% of the entire population of the territory of the Five Tribes. Census Office, *Extra*

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[1] Convention with the Cherokees pmbl., May 6, 1828, 7 Stat. 312; Convention with the Chickasaws art. II, May 24, 1834, 7 Stat. 450; Convention between the Choctaws and Chickasaws art. I, Jan. 17, 1837, 7 Stat. 605; Treaty with the Choctaws art. IV, Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks and Seminoles arts. I, IV, Aug. 7, 1856, 11 Stat. 699, 700.

Census Bulletin: The Five Civilized Tribes in Indian Territory 4 (1894).

The tribal governments were ill-equipped to govern the rapidly increasing non-Indian population. Rampant disorder and lawlessness reigned. In the Creek Nation, Indians were subject to harsh laws and penalties under the tribal code, *see* Arrell Gibson, *Oklahoma: A History of Five Centuries* 137 (2d ed. 1981), but non-Indians lived beyond the reach of tribal courts. Federal district courts in neighboring Arkansas (and later in Kansas and Texas) had criminal jurisdiction over cases involving U.S. citizens arising in Indian Territory. *See* Jeffrey Burton, *Indian Territory and the United States* 71 (1995). But given the distance, "only the most depraved—and least fortunate—of bandits were hauled before ... the Fort Smith bench of 'Hanging Judge' Isaac Parker." Danney Goble, *Progressive Oklahoma* 71 (1980). Violent crime went largely unpunished, and business agreements were effectively unenforceable. *Id.* Congress responded by creating federal territorial courts in Indian Territory and extending Arkansas law to govern non-Indians in the Territory. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 693, 696.

The increasing assertion of federal authority in Indian Territory signaled Congress's broader repudiation of the policy of seclusion in favor of assimilation and eventual statehood for the Indian Territory. Proposals to convert the area—an enclave of mineral-rich, untilled land with a booming non-Indian population—into one or more States had been floated in Congress every year since 1870. Carter, *supra*, at 2. But because Congress had promised the Five Tribes communal land ownership and autonomous governments according to their territorial boundaries, erad-

icating these foundations was a prerequisite for the incorporation of Indian Territory into a new State. Gibson, *supra*, at 193–94; *see also* Luther B. Hill, *A History of the State of Oklahoma* 337–45 (1910).

The "steady drift across the [Missouri] border for many years, and the presence among the Indians of hundreds of thousands of persons who were outlanders under their own flag finally made it necessary to abolish the tribal organization." Roy Gittinger, *The Formation of Oklahoma* 211 (1939); *see also Marlin v. Lewallen*, 276 U.S. 58, 61 (1928). "Congress finally assumed complete control over [the Creek Nation] and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal v. McKay*, 237 U.S. 372, 381 (1915).

With the goal of statehood in mind, Congress proceeded to dissolve the Five Tribes' communal land tenure and to end self-rule. In 1893, Congress appointed a three-person commission, led by Senator Henry Dawes, to "enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes," whether by cession, allotment, or some other method, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *McDougal*, 237 U.S. at 380–81; *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899).

Concomitant with the creation of a new State was "the dissolution of the Five Civilized Tribes." Gittinger, *supra*, at 236. Congress established the Com-

mission "in pursuance of a policy which looked to the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911); *Marlin*, 276 U.S. at 61 (same). As the Secretary of the Interior impressed upon the Commission, "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, ... the admission of another state or states in the Union." Carter, *supra*, at 3 (quoting letter from Secretary Hoke Smith to Henry Dawes).

Negotiations failed, and "when the tribal governments refused to cooperate in their own demise," Congress used its legislative power to force the completion of the Commission's work. *Id.* at ix. In annual congressional reports, the Dawes Commission painted a bleak picture of Indian Territory plagued by corruption, misrule, and crime. In 1895, the Commission wrote: "It is ... the imperative duty of Congress to assume at once the political control of the Indian Territory." S. Rep. No. 54-12, at 20. The Commission considered the Five Tribes' "so-called governments ... wholly corrupt, irresponsible, and unworthy to be longer trusted" to govern. *Id.* at 19; *see Woodward*, 238 U.S. at 296–98; *Heckman v. United States*, 224 U.S. 413, 434–35 (1912).

Motivated by a desire to break up the tribes' communal land tenure and in response to the disorder it perceived in Indian Territory, *see* Debo, *supra*, at 24–25, the Commission recommended the establishment of a territorial government and the extension of U.S. jurisdiction over all matters relating to the use and occupation of tribal lands, S. Rep. No. 54-12, at 20. Congress thereafter authorized the Commission to survey Indian Territory and enroll tribal

members in preparation for allotment, with or without tribal consent. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 321, 339, 343. Congress extended the authority of the federal courts, while steadily diminishing the tribal courts and tribal laws. Hill, *supra*, at 318. In a concerted campaign to abolish race-based jurisdictional distinctions in Indian Territory, Congress in 1897 rendered tribal courts obsolete by conferring exclusive jurisdiction on federal courts to try all civil and criminal cases, and by subjecting all people in Indian Territory "irrespective of race" to Arkansas and federal law. Indian Department Appropriations Act, ch. 3, § 1, 30 Stat. 62, 83 (1897); *Marlin*, 276 U.S. at 61–62; *Washington v. Miller*, 235 U.S. 422, 424–25 (1914).

In 1898, Congress passed the Curtis Act, ch. 517, 30 Stat. 495, "to complete the destruction of the tribal governments." Carter, *supra*, at 34. To that end, Congress abolished tribal courts, § 28, 30 Stat. at 504–05, and banned federal courts from enforcing tribal law, § 26, 30 Stat. at 504. Senator William Bate—one of few dissenting voices to the Act's passage—called the Curtis Act the "consummation" of the United States' abrogation of its treaties with the Five Tribes. The Act "sweeps all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under the treaties which they have been given and guaranteed by the Government of the United States. ... [W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed." 31 Cong. Rec. 5593 (1898).

The Curtis Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment. § 11, 30 Stat. at 497. The Seminoles, Choc-

taws, and Chickasaws had already reached allotment agreements with the United States, and the Creeks and Cherokees quickly capitulated. The Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901), provided "for a permanent enrollment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation." *Sizemore v. Brady*, 235 U.S. 441, 447 (1914); *accord Marlin*, 276 U.S. at 63. Congress provided that each of the Five Tribes' governments would terminate by March 4, 1906. Creek Allotment Agreement § 46, 31 Stat. at 872; Curtis Act § 29, 30 Stat. at 512 (Choctaw and Chickasaw); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 716, 725 (Cherokee); Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 982, 1008 (Seminole).

All told, the Dawes Commission considered 300,000 claims to tribal membership, enrolled more than 100,000 tribal members, and allotted 15,794,400 acres of land in Indian Territory—an area twice the size of Maryland. Gibson, *supra*, at 195. This "was a vast and difficult undertaking; and no previous disposition of either lands or tribes afforded precedents for guidance." Hill, *supra*, at 323. By this time, tribal governments "were little more than consulting agents in the management of the business of the tribes." Gittinger, *supra*, at 233. The Five Tribes "had ceased to exist except as financial corporations," *id.* at 234, whose assets were being liquidated and affairs wound up.

In April 1906, Congress passed the Five Tribes Act, providing for "the final disposition of the affairs

of the Five Civilized Tribes in the Indian Territory." Ch. 1876, 34 Stat. 137. Congress closed the tribal rolls, abolished tribal taxes, ended the tribes' control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. Unallotted lands were to be sold by the government, with the proceeds applied to the Tribe's debts and any remainder paid out per capita to individual tribal members. §§ 16–17, 34 Stat. at 143–44. Congress extended tribal governments, but with severe limitations on their operations and authority. § 28, 34 Stat. at 148.

As the governor of the Choctaw Nation put it in November 1906, the tribal government was "only a shell of a government, it is hardly anything. ... I do not feel any longer that I act as chief, that I have any authority. ... Now, the only authority that I have is to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886 (1907). In his 1908 address to the Creek National Council, Chief Moty Tiger said, "the affairs of the Creek are so nearly closed up, insofar as any notion of the tribal authorities will affect the same, that there is but little I can call to your attention." Gaston Litton, *Creek Papers 1870–1930*, at 401 (1937), https://goo.gl/Jm17L6. One federal judge similarly commented that tribal governments were "a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs." *United States v. Allen*, 171 F. 907, 921 (E.D. Okla. 1909).

Two months after passing the Five Tribes Act, Congress enacted the Oklahoma Enabling Act, authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Ch. 3335, 34

Stat. 267 (1906). Congress directed the transfer of all cases arising under federal law, pending in territorial courts in Indian and Oklahoma Territory at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. at 276. *All* other cases were transferred to state court. § 20, 34 Stat. at 277. Congress also extended the laws of Oklahoma Territory to Indian Territory (supplanting Arkansas law), until the new Oklahoma legislature provided otherwise. § 13, 34 Stat. at 275.

The stage was thus set for Oklahoma's accession to statehood. When President Theodore Roosevelt signed a proclamation admitting Oklahoma to the Union on November 16, 1907, Indians constituted just 5% of the population of the new State. Census Bureau, *Population of Oklahoma and Indian Territory* 8 (1907). From Oklahoma's entrance to the Union to the present day, the State has exercised criminal jurisdiction over all of its citizens, Indians and non-Indians alike, on the understanding that the former Indian Territory is not a reservation. Conversely, neither federal nor tribal prosecutors have treated the former Indian Territory as a reservation.

B. Factual background and proceedings below

1. On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs. Both men are members of the Creek Nation. The crime began when Mr. Murphy used his vehicle to force Mr. Jacobs' car off the road late at night in a rural area of Henryetta, Oklahoma. Mr. Murphy and two accomplices pulled Mr. Jacobs out of the car and began to beat him. Over the course of five minutes, Mr. Murphy and his accomplices severed Mr. Jacobs' genitals with a folding knife and

stuffed them into Mr. Jacobs' mouth, pulled Mr. Jacobs into a roadside ditch, slashed his throat and chest, and "tried to stomp on [his] head like a pancake." App. 140a. They left Mr. Jacobs to die beside the deserted road. Mr. Murphy then instructed his accomplices to drive to a nearby home to kill Mr. Jacobs' son, George Jr. Someone in the house intervened, saving George Jr.'s life. Later that evening, Mr. Murphy confessed to both his girlfriend and his cousin. *Id.* Mr. Murphy was convicted in state court for first-degree murder and sentenced to death. App. 203a. His conviction and sentence were affirmed on appeal. *Id.*

2. In his second application for state post-conviction relief, in 2004, Mr. Murphy argued that Oklahoma courts lacked jurisdiction to convict him because he is an Indian and, he alleged, he committed his crime within the boundaries of the Creek reservation and thus could only be tried in federal court under the Major Crimes Act. That Act gives federal courts exclusive jurisdiction over certain crimes in "Indian Country," 18 U.S.C. § 1153, and defines "Indian Country" to include an "Indian reservation," *id.* § 1151(a). The state court concluded that Oklahoma's jurisdiction was proper. The Oklahoma Court of Criminal Appeals agreed and denied post-conviction relief, finding no authority to support Mr. Murphy's theory that the 1866 boundaries of the Creek territory remained intact as a "reservation." *See* App. 222a–224a.[2]

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[2] The state courts also rejected Mr. Murphy's claim that the crime occurred in Indian Country under §§ 1151(b) and (c), which pertain to "dependent Indian communities" and "Indian allotments." App. 215a–222a, 224a–225a.

Mr. Murphy petitioned for a writ of certiorari on the question whether his crime was committed within Indian Country. *Murphy v. Oklahoma*, No. 05-10787. In response to this Court's invitation, the United States filed a brief expressing the view that Congress has extinguished the historic boundaries of the Creek Nation. U.S. Br. at 15–20, 2007 WL 1319320. This Court denied certiorari. 551 U.S. 1102 (2007).

3. On federal habeas review under 28 U.S.C. § 2254, Mr. Murphy asserted that the Oklahoma Court of Criminal Appeals had misapplied federal law on the question whether he committed the crime in Indian Country. The district court held that the state court's decision rejecting Mr. Murphy's jurisdictional challenge was neither contrary to nor an unreasonable application of clearly established federal law and denied federal habeas relief. App. 184a–195a.

4. The Tenth Circuit reversed. The court held that federal law clearly established that Mr. Murphy's crime occurred in Indian Country under 18 U.S.C. § 1151(a), because Congress never disestablished the 1866 boundaries of the Creek territory, which encompassed the land where the murder occurred. App. 132a–133a. The panel applied the three-part framework set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), which looks to statutory text, surrounding circumstances, and subsequent history. In an extended analysis of the main statutes at issue, App. 78a–102a, the Tenth Circuit concluded that the State's argument failed at the first step because no text "expressly" disestablished or diminished the boundaries of the Creek Nation. App. 96a. The court further concluded that the contemporaneous and subsequent history did not "unequivocally reveal"

congressional intent to erase the historical boundaries of the Creek territory. App. 107a, 119a (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)).[3]

The Tenth Circuit denied rehearing on November 9, 2017. Chief Judge Tymkovich concurred separately to urge "further attention by the Supreme Court." App. 230a. The panel stayed issuance of the mandate to permit Oklahoma to seek this Court's review. App. 233a.

REASONS THE PETITION SHOULD BE GRANTED

I. The question presented is critically important

The question of whether the historical boundaries of the Creek Nation, or the Five Tribes more generally, constitute Indian Country under 18 U.S.C. § 1151(a) has enormous ramifications for the State, the federal government, the Five Tribes, and over 1.8 million Oklahoma residents. Since the birth of the State, the universal understanding has been that the former Indian Territory, *i.e.*, the eastern half of the State, is not reservation land. The Tenth Circuit upended that understanding in one fell swoop, creating massive disruption. This Court's review is urgently needed to restore stability and certainty regarding the State's ability to govern its citizens.

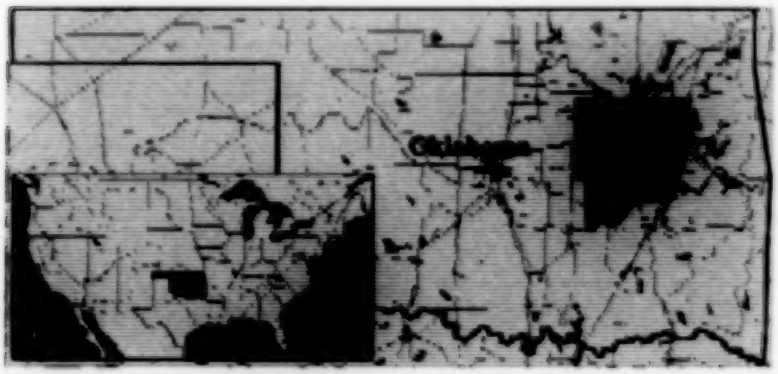
A. The affected area is massive

Whether an Indian reservation exists raises "issues of importance pertaining to this country's relationship to its Indian wards." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 353–

[3] In his appeal, Mr. Murphy also argued that the crime occurred on an Indian allotment. Because the Tenth Circuit held that the crime occurred on an Indian reservation, the panel did not address Mr. Murphy's allotment argument. App. 15a.

54 (1962). This Court thus routinely grants review to address that question, even absent any apparent conflict among the lower courts. *E.g.*, *id.*; *Parker*, 136 S. Ct. 1072; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977); *Mattz v. Arnett*, 412 U.S. 481, 485 (1973).

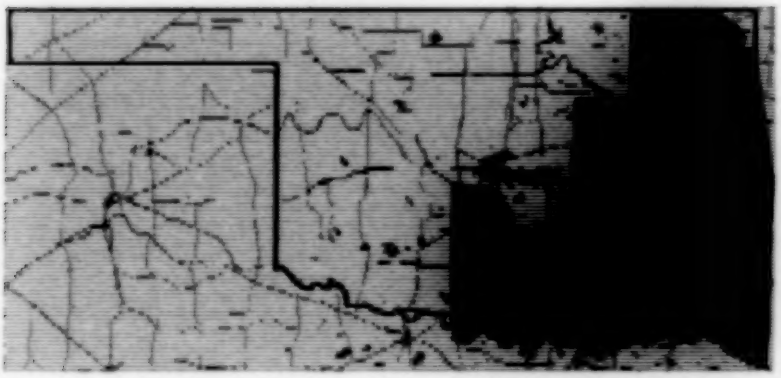
The importance of that issue is magnified exponentially here. The sheer size of the territory sets this case apart from any prior disestablishment dispute in our country's history. The 1866 boundaries of the Creek Nation alone encompass over 4,600 square miles of land populated by more than 750,000 people, as shown below:



The 1866 boundaries also include most of Tulsa, the State's second largest city and home to more than 403,000 Oklahomans. Census Bureau, *QuickFacts: Tulsa city, Oklahoma* (2016), https://goo.gl/2jK19d. A reconstituted Creek territory would be by far the largest Indian reservation by population in the United States. For comparison, the largest reservation is currently the Navajo Nation, with a total population of 174,000, only 4,300 of whom are non-native. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 14 & tbl.6 (2012), https://goo.gl/Nw37yg.

Moreover, the decision below could extend to the other tribes whose lands collectively constituted Indian Territory. "The history of the removal of the Muskogee or Creek Nation from their original homes to land purchased and set apart for them ... in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes." *Woodward*, 238 U.S. at 293. The Five Tribes confronted the same issues that culminated in the allotment of their lands, the dissolution of their governments, and the merger of all their former territory with Oklahoma Territory to form Oklahoma. *Id.* at 293–96. Thus, although details vary from tribe to tribe, the Five Tribes share an overlapping statutory history that reflects Congress's deliberate extinguishment of their territorial sovereignty during the period leading up to Oklahoma statehood.

The land constituting the Five Tribes in the former Indian Territory covers nearly *half the State* in terms of area and population:



The 1866 boundaries of the Five Tribes include 29,965 square miles, about 43% of Oklahoma's land mass. The current population of this region is over 1.8 million—roughly 48% of Oklahoma's population.

See Census Bureau, *Interactive Population Map*, https://goo.gl/YF8sb8.

B. The question presented implicates fundamental questions of sovereignty

Whether this vast expanse of land is now Indian Country under 18 U.S.C. § 1151(a) strikes at the heart of Oklahoma's sovereignty.

1. The implications for criminal jurisdiction—the context of this case—are staggering. States lack criminal enforcement jurisdiction over offenses in Indian Country if either the defendant or victim is an Indian, regardless whether the Indian is an enrolled member of the tribe whose land is at issue. *Solem*, 465 U.S. at 463 n.2; Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (2017), https://goo.gl/uXKgQT. The federal government has exclusive criminal jurisdiction in such cases, aside from certain minor offenses subject to tribal court jurisdiction when both defendant and victim are Indians. 18 U.S.C. §§ 1152–53; 25 U.S.C. § 1302(a)(7). For over a century, Oklahoma has prosecuted offenses committed by or against Indians on the understanding that no reservations exist in the former Indian Territory. That will change overnight if this Court does not grant review.

Approximately 9% of Tulsa residents self-identify as Native American. That percentage is the highest of any large city in the United States other than Anchorage, Alaska. Census Bureau, *American Indian*, *supra*, at 12. Losing jurisdiction over crimes committed by or against Native Americans throughout a large and populous part of the State would inflict an enormous blow to the State's power to prosecute within its own borders. That result would impose a corresponding burden on federal authorities

and courts. In urging rehearing below, the United States estimated that the Tenth Circuit's decision could require federal authorities to investigate and prosecute hundreds (if not more than a thousand) of new cases *each year* within the boundaries of the Creek Nation alone—amounting to a tenfold increase in the caseload in the Northern and Eastern Districts of Oklahoma. U.S. Br. in Supp. of Reh'g, *supra*, at 2. These new responsibilities would overwhelm current federal resources in the region. *Id.* (noting that the FBI has the equivalent of just seven agents for all of eastern Oklahoma).

2. "Although [the] definition [of Indian Country] by its terms relates only to federal criminal jurisdiction," this Court has recognized "that it also generally applies to questions of civil jurisdiction." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). Absent this Court's review, the decision below will open up a Pandora's Box of questions regarding the State's regulatory power. For example, the State has limited power to tax tribal members on reservations. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 126 (1993). Reservation status also calls into question the State's ability to regulate non-Indians in areas ranging from taxation to natural resources. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (balancing test for State regulatory jurisdiction over non-Indians on reservations). Likewise, regulatory jurisdiction under major federal environmental statutes could shift from the State to the U.S. Environmental Protection Agency, absent EPA approval to delegate such responsibilities to the State. *See Okla. Dep't of Envtl. Quality v. Envtl. Prot. Agency*, 740 F.3d 185, 190–91, 194 (D.C. Cir. 2014) (Clean Air Act).

Moreover, affected residents and businesses would suddenly discover that their legal rights were radically altered overnight because they now reside on a reservation. *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). For instance, they would potentially be subject to tribal regulatory jurisdiction for matters ranging from taxation and tribal liquor ordinances, *e.g.*, *Parker*, 136 S. Ct. 1072; *Rice v. Rehner*, 463 U.S. 713 (1983), to land-use, zoning, and employment codes, *see Montana v. United States*, 450 U.S. 544, 565–66 (1981). Non-members could be subject to tribal-court jurisdiction in civil cases involving tribal members and may have to exhaust jurisdictional challenges in tribal court before litigating in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–19 (1987); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 171–77 (5th Cir.), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (extent to which tribal courts have jurisdiction to adjudicate tort claims against non-members).

Indeed, some federal statutes vest tribal courts with *exclusive* jurisdiction over disputes arising within a reservation, despite the presence of non-Indian parties. *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(a), 92 Stat. 3069, 3071. And while non-Indians will be subject to tribal jurisdiction, they have no role in shaping tribal laws that could apply to them. Non-members may not vote in tribal elections, and only Creek citizens with at least one-quarter blood quantum may hold office. Muscogee (Creek) Nation Const. art. III, § 4; *id.* art. IV.

C. The decision below is creating enormous disruption and uncertainty

1. The Tenth Circuit's decision has already triggered a wave of litigation, including dozens of collateral challenges to existing convictions. To date, criminal defendants have invoked the decision, in at least 46 cases in both Oklahoma state and federal courts, arguing that their crimes occurred on a reservation and thus fall outside state jurisdiction. *See, e.g.*, *Wade v. Martin*, No. WH-17-12 (Beckham Cty., Okla.) (Choctaw member claiming two 1986 murders occurred on Creek reservation); *Sims v. State*, No. F-17-635 (Okla. Crim. App.) (claiming victim was a member of Creek Nation); *In re Brown*, No. 17-7078 (10th Cir.) (claiming victim may have been a member of Cherokee Nation).

Although the State will resist any attempts to overturn valid convictions, the Tenth Circuit's decision raises the specter that hundreds or thousands of state convictions involving tribal members in the eastern half of Oklahoma will be subject to collateral attack. If any convictions are vacated, federal prosecutors must decide whether to retry those cases, many of which are decades old. Because older convictions typically include the most heinous crimes, violent criminals that the federal government is either unwilling or unable to retry may be released into the public. Inmates have even taken the unprecedented step of suing Oklahoma in *tribal court*. For instance, a Cherokee member convicted in 1989 for first-degree murder has sought a declaratory judgment in tribal court that the Cherokee reservation boundaries have not been diminished and that his conviction was void *ab initio*. *Mitchell v. Hunter*, No. CV-17-680 (Cherokee Nation Dist. Ct.). Although that challenge was

ultimately unsuccessful, such litigation will only multiply absent this Court's review.

2. This Court's review also is urgently needed to remove the jurisdictional cloud over current criminal prosecutions—*i.e.*, those that have yet to become final—as well as over any crimes that occur in the future. The decision below has inspired numerous defendants in ongoing state-court trials or direct-appeal proceedings to claim that either the defendant or the victim was a tribal member and that the crime occurred on a reservation of the Five Tribes. For example, a Choctaw tribe member under indictment for murder in the drowning death of his two-year-old daughter has cited the decision below, claiming the crime occurred on the Choctaw reservation and thus requesting transfer to federal court. *State v. Sizemore*, CF-16-593 (Pittsburg Cty., Okla.). Many similar examples exist.[4]

Perhaps as a sign of things to come, days after the Tenth Circuit issued its decision, one defendant—a former police officer charged with killing his daughter's boyfriend—obtained identification documents from the Creek Nation, claiming to be 1/128th Creek, and argued to the Oklahoma state court that the crime occurred on the Creek reservation. *See State v. Kepler*, CF-14-3952 (Tulsa Cty., Okla.); Samantha Vicent, *Shannon Kepler cites Creek Nation citizenship, 'Indian Country' ruling in asking for*

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[4] *See, e.g.*, *State v. Martin*, CF-16-782A (Carter Cty., Okla.) (Choctaw member claiming manslaughter occurred on Chickasaw reservation); *State v. Shriver*, CF-15-395 (Rogers Cty., Okla.) (Cherokee defendant claiming crimes, including second degree murder, occurred on Cherokee reservation); *State v. Mize*, CF-17-3891 (Tulsa Cty., Okla.) (Indian defendant claiming manslaughter occurred on Creek reservation).

murder case to be tossed, Tulsa World, Aug. 11, 2017, https://goo.gl/F2zwSn. He was recently convicted and sentenced to 15 years in prison but has filed his notice of appeal. The jurisdictional uncertainty clouding this and similar cases cries out for this Court's review.

3. The disruption also extends into the civil arena. The Cherokee Nation has cited the decision below to assert tribal-court jurisdiction over a dispute involving pharmaceutical companies on the theory that the borders of the Cherokee Nation were never disestablished. Suppl. Mem., *McKesson Corp. v. Hembree*, No. 17-cv-323 (N.D. Okla. Aug. 16, 2017); *id.*, 2018 WL 340042 (N.D. Okla. Jan. 9, 2018) (enjoining tribal-court proceedings). And the Comanche Nation has sued the federal government in an attempt to undo the acquisition of land into trust for the Chickasaw Nation, alleging, based on *Murphy*, that the Chickasaw's territorial borders were never disestablished. *Comanche Nation of Oklahoma v. Zinke*, No. 17-cv-887 (W.D. Okla.). Absent this Court's intervention, the decision below will impose intolerable and destabilizing uncertainty throughout half the State.

II. The decision below is wrong

Oklahoma's accession to statehood in 1907 marked the culmination of Congress's elimination of the boundaries of the Five Tribes' territories. Congress did not retain, in the form of "Indian Country" under Section 1151, a replica of the Indian Territory that Congress spent the prior twenty years dismantling. The notion that the tribes had sovereignty that could oust the State of jurisdiction over its citizens, or that the federal government bore responsibility to prosecute Indians living in former Indian Territory,

would have been anathema to the Congress that enabled Oklahoma to join the Union.

In reaching a contrary result as to the Creek Nation, the Tenth Circuit held that, under the three-part test set forth in *Solem*, 465 U.S. 463, Congress never disestablished the tribe's external borders. App. 132a–133a. But *Solem* addressed individual surplus land acts, and its application makes little sense here. The creation of Oklahoma on equal footing with other States stripped the external boundaries of Oklahoma's two constituent territories—as well as the internal tribal boundaries in Indian Territory—of any jurisdictional significance, including criminal jurisdiction.

Oklahoma was not required to prove disestablishment by pointing to talismanic statutory language or a magic date. The Five Tribes' political existence was founded on treaty promises guaranteeing independent, sovereign governments and the right to occupy land patented to them in fee simple as long as the tribes existed. To convert the Indian Territory to a new State, Congress supplanted the Five Tribes' communal land tenure, dismantled all material vestiges of tribal governments, and ensured that the State would thereafter prosecute its citizens regardless of race. Nothing more was needed. By statehood, tribal boundaries were a historical artifact.

A. Congress dismantled Indian Territory and tribal boundaries to create Oklahoma

Indian reservations are defined by "the right of reservation Indians to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), and by tribal "ability to exercise ... sovereign functions" within reservation borders, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S.

832, 837 (1982). This case fails that standard by a long shot. The Five Tribes had lost all indicia of territorial sovereignty by 1907. Congress had stripped the tribal governments of their most basic executive, legislative, and judicial functions in order to bestow those powers upon the new State.

Beginning in 1893, Congress engaged in an extensive and systematic legislative campaign to abolish tribal courts, eliminate tribal law, and dissolve tribal government—all to pave the way for Oklahoma's entry to the Union. Congress authorized the Interior Secretary to remove the principal chiefs of the Five Tribes and to appoint their successors, prohibited tribal governments from congregating more than 30 days per year, and barred them from enacting legislation or entering into contracts involving their funds or land without the President's approval. Five Tribes Act §§ 6, 28, 34 Stat. at 139, 148. Congress abolished tribal taxes, § 11, 34 Stat. at 141, and commandeered tribal schools until they could be replaced with state schools, § 10, 34 Stat. at 140. Congress took possession of tribal buildings and sold all their furniture. § 15, 34 Stat. at 143. And the Dawes Commission dramatically usurped one of the most foundational attributes of tribal sovereignty—the ability to determine tribal membership. *Supra* pp. 6–11. Congress continued the tribal governments beyond 1906 because the Dawes Commission had yet to finish the rolls, but tribal powers were limited to "winding up their affairs." *Allen*, 171 F. at 921. In the end, the tribes were left with no authority except "to sign deeds." S. Rep. No. 59-5013, pt. 1, at 886.

The court below brushed aside this 20-year history on the ground that tribal governance had no bearing on reservation status. App. 105a–107a. But whether Congress intended the State to have "juris-

diction over the disputed areas" or, conversely, whether Congress intended tribes to retain governmental authority over activities within that territory, has always been essential to determining whether tribal borders persist. *Rosebud*, 430 U.S. at 599 n.20. Thus, in *Solem*, this Court found significant that a surplus land act did not speak to the issue of "jurisdiction over the opened areas." 465 U.S. at 478. By contrast, congressional intent here is unmistakable: Congress stripped the Five Tribes of any meaningful vestige of sovereignty. By statehood, the land formerly occupied by the Creek Nation was not an Indian reservation in any sense of that term.

B. Congress conferred judicial authority over Indian Territory to Oklahoma

Congress systematically transferred to the State general criminal jurisdiction over Indians in the former Indian Territory. Beginning in 1897, Congress abolished tribal courts, made tribal law unenforceable, and established federal territorial courts to hear criminal cases under Arkansas law regardless of the defendant's race. *Supra* p. 9; Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (mandating that Arkansas law "embrace all persons and estates in Indian Territory, whether Indian, freedman, or otherwise"). The Oklahoma Enabling Act then transferred all pending federal-question and diversity cases to the newly created federal courts in Oklahoma. § 16, 34 Stat. at 276. But, significantly, Congress transferred *all* other cases to the newly created state courts. §§ 17–20, 34 Stat. at 276–77. These statutory provisions render it inconceivable that Congress dismantled Indian Territory but simultaneously created a jurisdictional "Indian Country" in its wake.

If any of the Five Tribes' territories remained intact as a reservation, the jurisdictional transfer to state courts would have clashed with the Major Crimes Act, which conferred "exclusive jurisdiction" to federal courts for any major crime committed in a State by an Indian "within the limits of any Indian reservation." Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153(a)). Because the Enabling Act directed a different course, state courts became the "legal successor" to the territorial courts for offenses committed before statehood, even by Indians. *Haikey v. State*, 105 P. 313, 314 (Okla. Crim. App. 1909).

For instance, in *Jones v. State*, 107 P. 738 (Okla. Crim. App. 1910), a federal grand jury indicted a Choctaw tribal member for murder occurring before statehood, but he "was tried after statehood by the district court of Atoka county." *Id.* at 738–39.[5] And another case involving a defendant, victim, and witnesses, "all being Indians," transferred from territorial court to state court after statehood. *Phillips v. United States*, 103 P. 861, 861 (Okla. Crim. App. 1909). Many similar cases exist.[6] Likewise, the State assumed jurisdiction over major crimes committed by

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[5] Mr. Jones identified himself as a Choctaw in his brief before this Court. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 4, *In re Jonas Jones*, 231 U.S. 743 (1913).

[6] *Sharp v. United States*, 118 P. 675 (Okla. Crim. App. 1911); *Wilson v. United States*, 111 P. 659 (Okla. Crim. App. 1910); *Bailey v. United States*, 104 P. 917 (Okla. Crim. App. 1909); *Keys v. United States*, 103 P. 874 (Okla. Crim. App. 1909); *Price v. United States*, 101 P. 1036 (Okla. Crim. App. 1909). The Indian identity of defendants in these cases and in *Haikey*, *supra*, appears on the Dawes rolls. *See* Oklahoma Historical Society, *Search the Final Dawes Rolls and Applications*, http://www.okhistory.org/research/dawes.

Indians in former Indian Territory immediately after statehood. *E.g.*, *Rollen v. State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912) (defendant "was a Cherokee citizen"); *Bigfeather v. State*, 123 P. 1026 (Okla. Crim. App. 1912).

This Court, too, understood from the outset that Oklahoma had jurisdiction over Indians in the former Indian Territory. In *Hendrix v. United States*, 219 U.S. 79 (1911), an Indian defendant indicted for murder in Indian Territory had successfully moved to transfer his case to a federal court in Texas, under a special venue statute for fair trials. Relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued after statehood that the federal court lacked jurisdiction to try him. *Id.* at 89. In rejecting that argument, the Court notably did not hold that federal courts had exclusive jurisdiction under the Major Crimes Act, but rather that the specific venue statute continued to apply to pending cases. *Id.* at 90–91. The United States acknowledged that, but for the temporal venue provision, Congress gave the State jurisdiction over crimes involving Indians. U.S. Br. at 12, *Hendrix v. United States*, No. 319 (U.S. 1910) ("[T]he enabling act ... and the subsequent organization of the State withdrew [Indian Territory] from the exclusive jurisdiction of the United States.").

The purported existence of reservations following statehood also would have left an implausible jurisdictional gap given the abolition of Creek courts in 1898. After statehood, federal courts had jurisdiction over *major* crimes committed by Indians against Indians on reservations. Ch. 341, § 9, 23 Stat. at 385. If, on the Tenth Circuit's theory, state courts possessed no criminal jurisdiction over Indians in the former Indian Territory, *no* court could have prosecuted In-

dians for committing such crimes as assault, bribery, forgery, and rioting against other Indians within the former Creek territory until Congress authorized the reestablishment of tribal courts in Oklahoma in 1936. *See* Act of June 26, 1936, ch. 831, § 2, 49 Stat. 1967. Given Congress's hyper-focus on rampant lawlessness in Indian Territory, *supra* p. 6, Congress could not plausibly have created a jurisdictional gap that would reintroduce the very misrule that Congress spent decades trying to eradicate.

C. *Solem* does not support the decision below

Notwithstanding this overwhelming evidence of congressional intent, the panel below held that the State could not prevail under the three-part framework set forth in *Solem*, 465 U.S. 463, because no singular statutory provision contained sufficiently clear language of land cession and because the contemporaneous and subsequent historical evidence of disestablishment was "mixed." App. 74a. That holding is wrong for two reasons. First, the panel erred at the threshold in holding *Solem* was the sole lens through which the court could ascertain congressional intent. Second, clear congressional intent is discernable even applying *Solem*.

1. This Court's *Solem* cases involve whether land designated by the federal government as Indian reservations within a pre-existing State retained reservation status when Congress opened the area for non-Indian settlement of surplus lands remaining after allotment.[7] In considering whether Congress al-

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[7] *See, e.g.*, *Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation in Nebraska); *Solem*, 465 U.S. 463 (Cheyenne Reservation in South Dakota); *Mattz*, 412 U.S. 481 (Klamath River/Hoopa Val-

tered the boundaries of a reservation by "special legislation in order to assure a particular reservation was in fact opened to allotment," *Mattz*, 412 U.S. at 496–97, this Court has held that land presumptively retains reservation status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470; *see United States v. Celestine*, 215 U.S. 278, 285 (1909). This presumption reflects the notion that allotment and non-Indian settlement may be "completely consistent with continued reservation status" "in a manner which the Federal Government ... regarded as beneficial to the development of its wards." *Mattz*, 412 U.S. at 497. *Solem* thus governs how to determine whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468, 472; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

This case is markedly different. The General Allotment Act that spawned surplus land acts excluded the Five Tribes. Ch. 119, § 8, 24 Stat. 388, 391 (1887). The Five Tribes' territories also were not "reservations" in the traditional sense, but rather lands held by the tribe through patents in fee simple. *See* Census Office, *Report on Indians Taxed and Not Taxed* 298 (1894). This case does not involve a sale of surplus land to non-Indians. In short, Oklahoma prosecuted Mr. Murphy not because he committed a crime on a parcel of land that Congress opened to non-Indian settlement, but because the exterior and internal boundaries of Indian Territory had evaporated by the formation of Oklahoma.

Allotment of the Five Tribes' lands was inextricably intertwined with Congress's systematic and de-

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ley Reservation in California); *Seymour*, 368 U.S. 351 (Colville Reservation in Washington).

liberate liquidation of the Five Tribes as territorial sovereigns to pave the way for the merger of Indian Territory and Oklahoma Territory to create a new State. *Solem*'s framework was not designed to analyze this situation. At a minimum, the panel erred in holding that the state court's decision was contrary to clearly established federal law under 28 U.S.C. § 2254(d). App. 44a.[8]

The court of appeals also erroneously faulted the State for not identifying specific language in a given statute that extinguished the Creek boundaries with words equivalent to "cede," a "lump-sum payment," or restoration of the land to "public domain." App. 76a. Those terms would have been unnecessary or senseless under these unique circumstances. Congress would not have "restored" to the "public domain" lands that were not federal domain, but rather communally owned fee lands with tribal deeds. Congress did not need to use the term "cede," when it was not seeking cession of lands but rather the dissolution of communal ownership. Likewise, Congress would never offer a "lump-sum payment" because the Tribes' lands were conveyed through allotment to their own members rather than to the government. As a jurisdictional matter, the result was identical. By dissolving the Tribes' communal title and distributing communal property through allotment while also divesting the Tribes of governmental authority, Congress eliminated territorial boundaries.

2. The Tenth Circuit's application of *Solem* was also flawed. The "touchstone to determine whether a

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[8] The State argued below that *Solem* was inapposite. Okla. C.A. Br. 46–47, 91; *see also* App. 44a–45a (addressing State's arguments).

given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. *Solem*'s factors are just a guide for discerning that intent. *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Rosebud*, 430 U.S. at 588 & n.4. A "traditional approach to diminishment cases" requires an examination of "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351. Thus, this Court has insisted that related statutes be read together. *Rosebud*, 430 U.S. at 606 n.30; *accord Hagen*, 510 U.S. at 415. In *Rosebud*, although the legislation opening the reservation did not explicitly diminish the reservation, an earlier but unratified agreement had established an "unmistakable baseline purpose of disestablishment" that was "carried forth and enacted" in subsequent legislation. 430 U.S. at 591–92.

The panel below misapplied these principles in parsing each statute seriatim and in isolation, thereby looking for one specific statute with specific terminology. That exercise missed the forest for the trees: Congress had spent the better part of two decades eviscerating tribal governments and destroying communal land tenure to form Oklahoma. Congress created the Dawes Commission in the first place to "enter into negotiations with [the Five Tribes] *for the purpose of the extinguishment of the national or tribal title* to any lands within that Territory ... to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, ch. 209, § 16, 27

Stat. 612, 645 (emphasis added). That extinguishment of title could be effected "either by cession of the same or some part thereof to the United States, *or by the allotment and division of the same in severalty* among the Indians of such nations or tribes." *Id.* (emphasis added). Congress viewed cession and allotment as equivalent means to the same end.

Congress reaffirmed this intent in later statutes allotting the land of the Creek Nation and divesting the tribe of each and every important feature of its sovereignty. *Supra* pp. 6–11. Additionally, in contrast to surplus land acts in which Congress directed the Treasury to retain proceeds for the tribe's benefit, allotment in the Five Tribes' territories mandated the division of all tribal land among tribal members as a prelude to the dissolution of the tribal government. *E.g.*, Creek Allotment Agreement §§ 3, 9, 31 Stat. at 862, 864. Congress directed any remaining tribal funds be distributed pro rata among the tribe's members. Supplemental Allotment Agreement, ch. 1323, § 14, 32 Stat. 500, 503 (1902); *see also* Five Tribes Act § 17, 34 Stat. at 143.

The *Solem* cases also require careful consideration of subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectations of people living in the area." *Hagen*, 510 U.S. at 421; *accord Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 356–57; *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 449 (1975). A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 357.

After statehood, Congress stripped away restrictions on alienation of most allotments, subjected

unrestricted allotments to state taxation regardless whether the allotments were still owned by tribal members, and applied state laws of succession and disposition on the remaining restricted allotments. Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312; *see also* Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731. Moreover, Congress required the tribes, on pain of fine or imprisonment, to transfer possession of all tribal property and funds, and for all tribal officers and representatives to surrender "all books, documents, records or any other papers" to the Secretary of the Interior. Act of May 27, 1908, ch. 199, § 13, 35 Stat. 312, 316.

These events extend beyond simple "de facto" disestablishment. App. 230a–232a. For a century, Oklahoma has governed the former Indian Territory, and no court until now has held that the State lacks criminal jurisdiction over Indians across the entire former Creek territory. Stripping Oklahoma of criminal jurisdiction over all Indians in this densely populated area, or even worse, in the entire eastern half of the State, would render Oklahoma a fractured, second-class State. *Cf. Coyle v. Smith*, 221 U.S. 559 (1911).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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February 6, 2018

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 07-7068 & 15-7041

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL, Warden, Oklahoma State Penitentiary,
Respondent-Appellee.

MUSCOGEE (CREEK) NATION; SEMINOLE NATION OF OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,
Amici Curiae.

Appeal From The United States District Court For The Eastern District Of Oklahoma
(D.C. Nos. 6:03-CV-00443-RAW-KEW and 6:12-CV-00191-RAW-KEW)

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Klint A. Cowan, Fellers, Snider, Blankenship, Bailey & Tippens, P.C., Oklahoma City, Oklahoma, appearing for amicus United Keetoowah Band of Cherokee Indians in Oklahoma.

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

MATHESON, Circuit Judge.

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Patrick Dwayne Murphy asserts he was tried in the wrong court. He challenges the jurisdiction of the Oklahoma state court in which he was convicted of murder and sentenced to death. He contends he should have been tried in federal court because he is an Indian and the offense occurred in Indian country. We agree and remand to the district court to issue a writ of habeas corpus vacating his conviction and sentence.

The question of whether the state court had jurisdiction is straightforward but reaching an answer is not. We must navigate the law of (1) federal habeas corpus review of state court decisions, (2) Indian country jurisdiction generally, (3) Indian reservations specifically, and (4) how a reservation can be disestablished

or diminished. Our discussion on each of these topics reaches the following conclusions.

First, we assume that a federal habeas court must give deference to a state court's determination that it had jurisdiction. Nonetheless, in this case, the Oklahoma court applied a rule that was contrary to clearly established Supreme Court law. We must apply the correct law.

Second, when an Indian is charged with committing a murder in Indian country, he or she must be tried in federal court. Mr. Murphy is a member of the Muscogee (Creek) Nation. Because the homicide charged against him was committed in Indian country, the Oklahoma state courts lacked jurisdiction to try him.

Third, Congress has defined Indian country broadly to include three categories of areas: (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments. *See* 18 U.S.C. § 1151. The reservation clause concerns us here. All land within the borders of an Indian reservation—regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land—is Indian country unless Congress has disestablished the reservation or diminished its borders.

Fourth, only Congress may disestablish or diminish an Indian reservation. Applying the Supreme Court's test to determine whether Congress has done so as to the Creek Reservation, we conclude it has not.

Mr. Murphy and the State agree that the offense in this case occurred within the Creek Reservation if Congress has not disestablished it. We conclude the Reservation remains intact and therefore the crime was committed in Indian country. Mr. Murphy, a

Creek citizen, should have been charged and tried in federal court.[1]

I. BACKGROUND

We begin with the facts of the crime as presented by the Oklahoma Court of Criminal Appeals ("OCCA").[2] We then discuss the procedural journey Mr. Murphy's case has traveled.

A. Factual History

In August 1999, Mr. Murphy lived with Patsy Jacobs. *Murphy v. State*, 47 P.3d 876, 879 (Okla. Crim. App. 2002). Ms. Jacobs was previously in a relationship with the victim in this case, George Jacobs, and had a child with him, George, Jr. *Id.* at 879–80. Mr. Murphy had an argument with her about Mr. Jacobs and said he was "going to get" Mr. Jacobs and his family. *Id.* at 879.

On August 28, 1999, Mr. Jacobs spent the day drinking with his cousin, Mark Sumka. *Id.* Around 9:30 p.m., Mr. Sumka was driving to a bar in Henryetta, Oklahoma, with Mr. Jacobs passed out in the back seat. *Id.* Mr. Murphy was driving on the same road in the opposite direction with two passengers—Billy Long and Kevin King. *Id.* After the cars passed each other, they stopped. *Id.* Mr. Murphy backed up and told Mr. Sumka to turn off the car, but Mr. Sumka drove off. *Id.*

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[1] Mr. Murphy raises eight issues in this appeal. Because we resolve his first issue by concluding the state courts lacked jurisdiction over this case, we do not address his other seven issues.

[2] *See* 28 U.S.C. § 2254(e)(1) (providing federal habeas court must presume state court's factual determinations are correct); *see also Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." (quotations omitted)).

Mr. Murphy and his passengers pursued and forced Mr. Sumka off Vernon Road, which runs through an area that is "remarkably rural [and] heavily treed . . . without any sort of improvement . . . except perhaps a rickety barbed wire fence." *Murphy v. State*, 124 P.3d 1198, 1206 (Okla. Crim. App. 2005); *see also* 47 P.3d at 879.

Mr. Murphy exited the car and confronted Mr. Sumka. 47 P.3d at 879. Mr. Long and Mr. King began hitting Mr. Jacobs. *Id.* at 880. Mr. Murphy approached Mr. Jacobs, trading places with Mr. Long, who went over and hit Mr. Sumka. *Id.* at 880. Mr. Sumka briefly ran off but came back about five minutes later. *Id.*

When he did, he saw Mr. Murphy throw a folding knife into the woods, and he saw Mr. Jacobs lying in a ditch along the road, barely breathing. *Id.* Mr. Murphy and his companions threatened to kill Mr. Sumka and his family if he said anything, and Mr. King struck Mr. Sumka in the jaw. *Id.*

Following Mr. Murphy's instructions, Mr. Sumka left the scene with the other men. *Id.* During the car ride away, they told Mr. Sumka they had cut Mr. Jacobs's throat and chest and had severed his genitals. *Id.* The group later went to Mr. King's home, where Mr. Jacobs's son, George, Jr., was staying, in an apparent attempt to kill him. *Id.* Mr. King's mother intervened and "thwarted [their] plan." *Id.* Mr. King went inside, and the rest of the group left. *Id.*

A passerby found Mr. Jacobs in the ditch with his face bloodied and slashes across his chest and stomach. *Id.* His genitals had been cut off and his throat slit. *Id.* According to a state criminalist, Mr. Jacobs had been dragged off the road after his genitals were severed. *Id.* His neck and chest had been cut on the side of the road, where he bled to death over the course

of four to twelve minutes, though it may have taken longer. *Id.*

After Mr. Murphy returned home and confessed to Ms. Jacobs, he was arrested. *Id.* The State of Oklahoma charged him with Mr. Jacobs's murder and sought the death penalty.

B. Procedural History

A jury convicted Mr. Murphy of murder in Oklahoma state court and imposed the death penalty. His appeal and post-conviction proceedings have since moved through the Oklahoma and federal courts as recounted below.

Although the overall history of Mr. Murphy's case is complex, the history of the jurisdictional claim we resolve here can be succinctly summarized. After Mr. Murphy's conviction and death sentence were affirmed on direct appeal, he applied for state post-conviction relief in 2004, arguing the Oklahoma state courts had lacked jurisdiction to try him. The OCCA ordered an evidentiary hearing. Following the hearing, the state district court concluded Oklahoma's jurisdiction was proper because the crime did not occur in Indian country. The OCCA affirmed that conclusion in 2005. Mr. Murphy then sought federal habeas relief, but the federal district court denied relief in 2007. Mr. Murphy now appeals.

In the interest of thoroughness, and because Mr. Murphy's case has until now proceeded in a disjointed fashion, we provide a complete procedural history below.

1. Trial

In 2000, a jury in McIntosh County, Oklahoma, convicted Mr. Murphy of first degree murder under Okla. Stat. tit. 21 § 701.7(A) (1999). In the penalty

phase, the jury found aggravating circumstances supported the death penalty. *Murphy*, 47 P.3d at 879. In accordance with the jury's verdict, the trial court imposed a death sentence. *Id.*

2. Direct appeal

Mr. Murphy raised a variety of trial issues in a direct appeal to the OCCA. On May 22, 2002, the OCCA affirmed his conviction. *Id.* at 888. The court also performed a statutorily mandated sentencing review in which the court considered the aggravating circumstances in light of the mitigating evidence, including Mr. Murphy's "mild mental retardation," and concluded his death sentence was "factually substantiated and appropriate." *Id.* at 887–88.[3]

3. First Application for State Post-Conviction Relief

On February 7, 2002, while his direct appeal was pending in the OCCA, Mr. Murphy filed his first application for state post-conviction relief. *See Murphy v. State*, 54 P.3d 556, 560 (Okla. Crim. App. 2002). He asked that his application be held in abeyance, *id.* at 566, until the Supreme Court decided its then-pending case of *Atkins v. Virginia*, 536 U.S. 304 (2002), which addressed whether the Eighth Amendment prohibits the execution of "mentally retarded persons," *id.* at 306.

On June 20, 2002, about a month after the OCCA affirmed on direct appeal, the Supreme Court held in *Atkins* that the Eighth Amendment "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (quotations

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[3] On April 21, 2003, the U.S. Supreme Court denied Mr. Murphy's petition for a writ of certiorari. *See Murphy v. Oklahoma*, 538 U.S. 985 (2003)

omitted). *Atkins* "[left] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (brackets and quotations omitted).

On September 4, 2002, the OCCA denied relief on all of the issues Mr. Murphy had raised in his first application for state post-conviction relief except his *Atkins* claim. 54 P.3d at 570. The OCCA used Mr. Murphy's case to adopt new, post-*Atkins* procedures to shield "mentally retarded" persons from execution. *See id.* at 567–69. These procedures, the OCCA explained, would govern "until such time" as the Oklahoma legislature enacted an alternative framework. *Id.* at 568. The OCCA remanded to the state district court "for an evidentiary hearing on the sole issue of [Mr. Murphy's] claim of mental retardation in accordance with" the OCCA's newly announced procedures. *Id.* at 570.

On remand, the state district court concluded Mr. Murphy "had not raised sufficient evidence to create a fact question on the issue of mental retardation." *Murphy v. State*, 66 P.3d 456, 458 (Okla. Crim. App. 2003). On March 21, 2003, the OCCA ruled this conclusion was "not clearly erroneous" and affirmed Mr. Murphy's death sentence. *Id.* at 458, 461.

4. Filing of First Application for Federal Habeas Relief

On March 5, 2004, Mr. Murphy filed a federal habeas application under 28 U.S.C. § 2254 asserting 13 grounds for relief.

On August 30, 2004, the U.S. District Court for the Eastern District of Oklahoma concluded Mr. Murphy's application contained some claims that had not been exhausted in Oklahoma state court. The federal district court directed Mr. Murphy to drop his unexhausted claims.

On September 10, 2004, Mr. Murphy did so by filing an amended application containing eight claims, all of which were exhausted. His amended application remained pending in the federal district court while he pursued additional relief in state court.[4]

5. Second Application for State Post-Conviction Relief

On March 29, 2004—shortly after he filed his original federal habeas application—Mr. Murphy returned to state court and filed a second application for post-conviction relief to exhaust claims he had dropped from his federal habeas application. His second application for state post-conviction relief alleged:

1. Oklahoma lacked jurisdiction because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country.[5]

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[4] The same day he filed his amended application, Mr. Murphy launched a short-lived appeal. He sought our review of the district court's order denying his request to stay the federal proceedings while he pursued his unexhausted claims in state court. Another panel of this court dismissed the appeal for lack of jurisdiction. *See Murphy v. Mullin*, No. 04-7094 (10th Cir. Dec. 16, 2004).

[5] In Oklahoma, "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997); *see also Triplet v. Franklin*, 365 F. App'x 86, 95 (10th Cir. 2010) (unpublished) (recognizing that, in Oklahoma, issues of subject matter jurisdiction are not waivable and can be raised for the first time in collateral proceedings); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010) (considering jurisdictional claim that crime occurred on federal land raised in prisoner's second application for post-conviction relief); *Magnan v. State*, 207 P.3d 397, 402

2. The OCCA's earlier denial of a jury trial on the issue of his "mental retardation" had violated his constitutional rights.
3. Oklahoma's lethal injection protocol violated the Eighth Amendment.

See Murphy, 124 P.3d at 1200, 1208–09. The OCCA ordered an evidentiary hearing on the jurisdictional claim. *Id.* at 1199.[6]

a. Evidentiary hearing

The state district court held a one-day evidentiary hearing. *Id.* at 1201. Mr. Murphy argued Oklahoma lacked jurisdiction because the crime occurred in Indian country and 18 U.S.C. § 1153 provides for exclusive federal jurisdiction over murders committed by Indians in Indian country.[7] The parties agreed that

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(Okla. Crim. App. 2009) (considering Indian country jurisdictional challenge and explaining subject matter jurisdiction may be challenged at any time).

[6] The OCCA ordered that the hearing answer the following six questions:

(1) Where exactly did the crime occur?

(2) Who "owns" title to the property upon which the crime occurred?

(3) If some or all of the crime occurred on an easement, how does that factor into the ownership question?

(4) How much of the crime occurred, if any, on an easement?

(5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151?

(6) Is jurisdiction over the crime exclusively federal?

124 P.3d at 1201 n.3 (paragraph breaks added).

[7] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any

Mr. Murphy and Mr. Jacobs, both members of the Muscogee (Creek) Nation, were Indians, but they disputed whether the crime occurred in Indian country, a term defined in 18 U.S.C. § 1151:

> [T]he term "Indian country" . . . means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (paragraph breaks added). An area qualifies as Indian country if it fits within any of these three categories. Mr. Murphy argued the crime occurred in Indian country under all three categories.[8]

In December 2004, the state district court concluded state jurisdiction was proper because the crime had occurred on state land. *See* 124 P.3d at 1200, 1202. The court, however, addressed only one of Mr. Murphy's three theories. *Id.* at 1207. It concluded the land was

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of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[8] In this appeal, however, he argues the location of the crime qualifies under the reservation clause of subsection (a) and the allotment clause of subsection (c). Because we agree with him that the crime occurred on an Indian reservation, we do not reach his allotment argument.

not an Indian allotment under § 1151(c), but it failed to address whether the location was (a) part of the Creek Reservation or (b) part of a dependent Indian community. *See id.* (noting the state district court failed to address these questions although the OCCA had "clearly asked" it to do so). Although the state district court viewed these matters as outside the scope of the evidentiary hearing, it allowed Mr. Murphy to make an offer of proof on his other two theories. *Id.*[9] The court ultimately ruled the State's exercise of criminal jurisdiction was proper and denied relief. *Id.* at 1202.

b. Appeal to the OCCA

Mr. Murphy appealed to the OCCA. On December 7, 2005, the OCCA denied relief on his jurisdictional and Eighth Amendment claims but granted limited relief on the *Atkins* claim. *See id.* at 1209.

On the jurisdictional issue, the OCCA found the record did not support some of the state district court's determinations, but it affirmed the ultimate determination that Oklahoma's jurisdiction was proper.

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[9] On the reservation question that concerns us here, Mr. Murphy argued:

> [T]he homicide occurred within the boundaries of the Creek Nation, which qualifies as Indian county because of its status as a reservation under federal jurisdiction. Unlike some other tribes, the Creek treaty lands were not disestablished or diminished by the acts of allotment and other federal legislation adopted in the early 20th century. As of 1999, the entirety of the historic Creek Nation lands thus remained Indian country, regardless of non-Indian ownership of particular tracts within those boundaries.

Def. Tr. Br. at 12 (filed Nov. 16, 2004), State Post-Conviction Record, OCCA Case No. PCD-2004-321, Vol. 1 at 66 (citing *Solem v. Bartlett*, 465 U.S. 463 (1984)).

Id. at 1201–08. The OCCA accepted the state district court's findings regarding where the crime unfolded, but it rejected the court's conclusion that Oklahoma owned the road and the ditch abutting it. *Id.* at 1202. Rather, the OCCA concluded, Oklahoma's "interest in the area in question is in the nature of an easement or right-of way." *Id.* The Creek Nation had long owned the land in question when, under a statute enacted in 1902, Oklahoma received the right to build a public highway. *Id.* at 1203. Tracing the history of the specific tract where the crime occurred, the OCCA concluded it had passed in the early twentieth century from the Creek Nation to Lizzie Smith, a member of the Creek Nation, and that all interest in the land—except for a restricted 1/12 mineral interest—had since been conveyed to non-Indians. *See id.* at 1204–06. The OCCA concluded this Indian interest was insufficient to qualify the land as an Indian allotment under § 1151(c): "A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction." *Id.* at 1206.[10]

The OCCA criticized the state district court for not addressing whether the crime was committed within the Creek Reservation or within a dependent Indian community, but it concluded the error was harmless because Mr. Murphy had been afforded a chance "to make an extended offer of proof." *Id.* at 1207. The OCCA said that the evidence, had it been admitted, was "insufficient" to show "that the tract in question

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[10] We discuss the OCCA's decision regarding Mr. Murphy's allotment theory under § 1151(c) because it forms part of the procedural history of this case, but we offer no comment on the merits of the OCCA's decision on this front. Our opinion is limited to the reservation question under § 1151(a).

qualifies as a reservation or dependent Indian community." *Id.*

With respect to the reservation theory, the OCCA acknowledged our decision in *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), where we recognized the Creek Reservation still exists but reserved the question whether its 1866 boundaries remain intact, 829 F.2d at 975–76. *See* 124 P.3d at 1207–08 (discussing *Indian Country, U.S.A.*). The OCCA stated: "If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." *Id.* at 1208.[11]

As for the two non-jurisdictional issues Mr. Murphy raised in his second post-conviction application, the OCCA granted limited relief on one and denied relief on the other. First, it reversed course on the *Atkins* issue and found Mr. Murphy *had* provided sufficient evidence to create a factual question for a jury on his "mental retardation claim." *Id.* It therefore ordered the case remanded. *Id.* Second, the OCCA ruled Mr. Murphy had waived his Eighth Amendment challenge to Oklahoma's lethal injection protocol by failing to raise it earlier. *Id.* at 1209.

In summary, the OCCA rejected the jurisdictional challenge and the Eighth Amendment claim, but it remanded for a jury trial on Mr. Murphy's *Atkins* claim.[12]

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[11] The OCCA also rejected the dependent Indian community theory under § 1151(b). See 124 P.3d at 1208. That ruling is not before us because Mr. Murphy now raises only the allotment and reservation theories.

[12] Mr. Murphy petitioned the U.S. Supreme Court for certiorari on two aspects of the OCCA's jurisdictional decision: (1) whether Oklahoma lacked jurisdiction because the crime occurred on a restricted Indian allotment under § 1151(c) and (2) whether

c. *Atkins* trial and appeal

Following a September 2009 trial in the state district court, a jury in McIntosh County rejected Mr. Murphy's claim of "mental retardation." *Murphy v. State*, 281 P.3d 1283, 1287 (Okla. Crim. App. 2012) (discussing jury trial). But the trial judge declared a mistrial based on an error of state law and reset the case for a new trial. *Id.*[13]

Before the re-trial, the State moved to terminate further proceedings. A state statute had supplanted the OCCA's *Atkins* procedures and provided that no defendant who received an intelligence quotient ("I.Q.") score of 76 or above could "be considered mentally retarded." Okla. Stat. tit. 21 § 701.10b(C); *see also* 281 P.3d at 1287–89. Because Mr. Murphy had received an I.Q. score of 80 on one test and 82 on another, the trial court granted the State's motion and terminated proceedings on January 27, 2011. 281 P.3d at 1288.

Mr. Murphy appealed and raised four propositions of error to the OCCA. *Id.* at 1287. On April 5, 2012, the OCCA ruled the district court had properly relied on the new state law. *Id.* at 1289. The OCCA rejected all

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Oklahoma lacked jurisdiction because the crime occurred within the limits of an Indian reservation under § 1151(a). The Supreme Court called for the views of the United States, and the Solicitor General filed a brief arguing the Court should deny Mr. Murphy's petition because the OCCA had correctly determined that the crime was not within the exclusive jurisdiction of the federal government. *See* Brief for the United States as Amicus Curiae, *Murphy v. Oklahoma*, No. 05-10787, 2007 WL 1319320, at *4. The Supreme Court denied Mr. Murphy's petition for certiorari without comment. *Murphy v. Oklahoma*, 551 U.S. 1102 (2007).

[13] The court declared a mistrial because neither side had been afforded its full complement of peremptory challenges—a structural error under Oklahoma law at the time. *See* 281 P.3d at 1287 & n.1.

of Mr. Murphy's claims, thus concluding proceedings on the second post-conviction application. *Id.* at 1294.

6. Federal District Court Proceedings on First Federal Habeas Application

On December 28, 2005, after the OCCA rejected his jurisdictional and Eighth Amendment claims but before the conclusion of the *Atkins* proceedings, Mr. Murphy moved to amend his federal habeas application. The district court granted the motion and allowed Mr. Murphy to add two newly exhausted claims: (1) the challenge to Oklahoma's jurisdiction, and (2) the Eighth Amendment lethal-injection challenge. These two claims were added to Mr. Murphy's eight previously exhausted federal claims, which were still pending.

On August 1, 2007, the district court entered an opinion and order denying all ten claims in Mr. Murphy's habeas application. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1294–95 (E.D. Okla. 2007).

On the jurisdictional claim, Mr. Murphy argued the crime had occurred in Indian country under just two theories: (1) the land was part of the Creek Reservation under § 1151(a) and (2) the land was an Indian allotment under § 1151(c). *Id.* at 1288. Applying the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the district court ruled that the OCCA's decisions against Mr. Murphy on these theories were neither contrary to nor an unreasonable application of clearly established federal law. *See* 497 F. Supp. 2d at 1286–92.

The district court rejected Mr. Murphy's other claims but granted him three certificates of appealability ("COAs")[14] to challenge his counsel's effectiveness, one

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[14] "[A] prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or

of the death-eligibility aggravating circumstances, and the trial court's failure to define life without parole for the jury.

7. First Appeal to the Tenth Circuit (No. 07-7068)

Mr. Murphy appealed to this court. On November 16, 2007, we abated the appeal to await resolution of Mr. Murphy's then-pending *Atkins* claim in Oklahoma state court.

8. Second Application for Federal Habeas Relief

On April 26, 2012, following the OCCA's final denial of his *Atkins* claim, Mr. Murphy filed a second § 2254 application in the Eastern District of Oklahoma that challenged the OCCA's resolution of the *Atkins* issue.[15] The district court denied relief. *Murphy v. Trammell*, No. CIV-12-191-RAW-KEW, 2015 WL 2094548, at *13 (E.D. Okla. May 5, 2015) (unpublished).

9. This Consolidated Appeal

Mr. Murphy sought to appeal from the district court's denial of relief on his second § 2254 habeas application. We consolidated that appeal (No. 15-7041) with his appeal from the denial of his first habeas application (No. 07-7068) to form this case.

Mr. Murphy raises eight issues. Because he obtained COAs for each one,[16] our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A).

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judge" before an appeal can be heard. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *see* 28 U.S.C. § 2253(c).

[15] The district court treated the application as second and successive and transferred it to this court. We concluded that at least a portion of Mr. Murphy's *Atkins* challenge could proceed and ordered a partial remand. *In re Murphy*, No. 12-7055, at 2 (10th Cir. Nov. 1, 2012) (unpublished order).

[16] The district court granted Mr. Murphy three COAs and we granted five more. The district court granted COAs for Mr. Murphy's arguments regarding: (1) ineffective assistance of

As to one of the issues—whether Oklahoma or the federal government had jurisdiction over the murder case—we granted the motion of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma to file a joint amici brief.[17] We likewise permitted the United Keetoowah Band of Cherokee Indians in Oklahoma to file an amicus brief. The Tribes also participated at oral argument.

II. LEGAL BACKGROUND

We conclude the crime occurred on the Creek Reservation and therefore the Oklahoma courts lacked jurisdiction. This section addresses the law applicable to the jurisdictional issue. We begin with (A) our standard of review and then address (B) the substantive law of Indian country jurisdiction.

A. Standard of Review

The parties disagree over the standard of review that should apply to Mr. Murphy's jurisdictional claim. The State contends AEDPA's deferential standard should apply. Mr. Murphy disagrees and argues we

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counsel, (2) the "heinous, atrocious, or cruel" aggravating circumstance, and (3) the trial court's failure to define "life without parole" for the jury. In June 2015, we ordered Mr. Murphy to file a motion for additional COAs across both appeals. We granted COAs for his claims regarding: (1) victim-impact statements, (2) Oklahoma's jurisdiction, (3) the district court's refusal to stay and abate proceedings on his first federal habeas application, (4) Oklahoma's procedural handling of his *Atkins* claim, and (5) cumulative error. *Murphy v. Warrior*, Nos. 07-7068 & 15-7041, at 1–2 (10th Cir. Jan. 6, 2016) (unpublished order). All eight issues are properly before us in this appeal, but our resolution of the jurisdictional claim obviates the need to address the other seven issues.

[17] Because this case concerns the Creek Reservation, we refer to the Tribes' joint brief with the shorthand "Creek Nation Br."

should review his claim de novo. We begin by discussing this disagreement, but we choose not to resolve it because Mr. Murphy prevails even under AEDPA review. Because we assume the AEDPA standard applies, we then go on to describe it.

1. The Parties' Dispute

As we discuss in greater detail below, AEDPA generally requires federal habeas courts to defer to state court decisions. Mr. Murphy argues AEDPA does not apply when, as here, a state court denies a defendant's challenge to the state court's subject matter jurisdiction. AEDPA deference, he maintains, "presupposes" the state court had jurisdiction to decide a given claim in the first place. Aplt. Br. at 26. Because the question of Indian country jurisdiction implicates tribal and federal sovereignty interests, he also contends that federal courts, unconstrained by AEDPA, must make the final determination over the jurisdictional issue. And he argues that applying AEDPA to jurisdictional claims would pose separation-of-powers and other constitutional problems.

The State responds that nothing in AEDPA says subject matter jurisdiction claims should be reviewed de novo. It notes Mr. Murphy has failed to cite a case in support of his view that AEDPA does not apply to jurisdictional questions. It argues Mr. Murphy has waived any argument against AEDPA's application because he supported the district court's application of AEDPA below. The State also disputes his constitutional arguments.

We need not decide whether this issue is waivable, whether Mr. Murphy has waived it here, or even whether AEDPA is the appropriate standard. We choose to assume without deciding that AEDPA applies.

We took this approach in *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013). Both sides agree *Magnan* left open the question of whether AEDPA applies to Indian country jurisdictional claims. *Magnan* concerned an Indian defendant whom an Oklahoma state court had sentenced to death. *Id.* at 1160–61. The defendant challenged the state court's jurisdiction. *Id.* at 1163. We assumed without deciding that AEDPA applied and concluded that, even under AEDPA's deferential standard, the OCCA had erred in concluding Oklahoma had jurisdiction over the case. *Id.* at 1160–61, 1164.[18] We held the crime occurred in Indian country, making jurisdiction exclusively federal. We ordered Mr. Magnan released from state custody without resolving the "difficult question" of whether AEDPA constrains federal court review of a state court's jurisdictional ruling regarding Indian country. *Id.* at 1164, 1176–77.[19] As in *Magnan*, we can assume without deciding that AEDPA applies because Mr. Murphy is entitled to relief even under that formidable standard of review.

2. The AEDPA Standard

We first discuss AEDPA's general framework and then focus on the statute's "contrary to" clause because that provision guides our analysis.

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[18] *See also Yellowbear v. Att'y Gen. of Wyo.*, 380 F. App'x 740, 743 (10th Cir. 2010) (unpublished) (leaving open the question of whether AEDPA applies and concluding on federal habeas review of state murder case that Wyoming Supreme Court's ruling on Indian reservation issue in favor of state jurisdiction should be affirmed regardless of whether de novo or AEDPA standard applied).

[19] Mr. Magnan was later convicted in federal court of three counts of murder in Indian country. We affirmed his convictions. *See United States v. Magnan*, __ F.3d __, No. 16-7043, 2017 WL 3082157, at *1, *4 (10th Cir. July 20, 2017).

a. Overview

"AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). When a state court adjudicates a claim on the merits, AEDPA prohibits federal courts from granting habeas relief unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). "If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).[20]

Section 2254(d) provides three ways to overcome AEDPA deference. Two appear in § 2254(d)(1), which provides that a state prisoner can qualify for habeas relief by showing a state court decision was (1) "contrary to" or (2) "involved an unreasonable application of" federal law that was clearly established by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see Bell v. Cone*, 535 U.S. 685, 694 (2002) (explaining the "contrary to" and "unreasonable application" clauses each

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[20] AEDPA concerns federal court deference to the decisions of state courts. Our review of the federal district court's application of AEDPA is de novo. *See Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) ("[W]e review the district court's legal analysis of the state court decision de novo and its factual findings, if any, for clear error." (quotations omitted)).

carry "independent meaning"). The third way, in § 2254(d)(2), requires a state prisoner to show that a state court decision was based on an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). Thus, "[e]ach of AEDPA's three prongs—contrary to clearly established federal law, unreasonable application of clearly established federal law, and unreasonable determination of the facts—presents an independent inquiry." *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017).

Mr. Murphy makes arguments based on all three, but because we need apply only § 2254(d)(1)'s "contrary to" provision to resolve this case, we restrict our discussion to that clause.

b. The "contrary to" clause

When a state court adjudicates a prisoner's federal claim on the merits, review under § 2254(d)(1)'s "contrary to" clause proceeds in three steps.

First, we must decide whether there is clearly established federal law that applies to the claim. *See House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) ("Whether the law is clearly established is *the* threshold question under § 2254(d)(1)."). In discerning what law is "clearly established," we must look only to the decisions of the Supreme Court, *see Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam) (explaining circuit precedent "cannot form the basis for habeas relief under AEDPA"), and we must "measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision," *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (emphasis and quotations

omitted).[21] Within this set of cases, "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (brackets and quotations omitted).

Second, if we can identify clearly established law, we then must assess whether the state court's decision was "contrary to" that law. *See* 28 U.S.C. § 2254(d)(1); *see also House*, 527 F.3d at 1018. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (controlling opinion of O'Connor, J.) (quoting Webster's Third New International Dictionary 495 (1976)). A state court decision violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Id.* If the state court identifies and applies "the correct legal rule," its decision will not be "contrary to" federal law, but the state court's application of the correct rule can still be evaluated under § 2254(d)(1)'s "unreasonable application" clause. *Id.* at 406.

Third, if the state court rendered a decision that was "contrary to" clearly established Supreme Court precedent by applying the wrong legal test, we do not necessarily grant relief; rather, we review the claim applying the correct law. Put differently, "it is . . . a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review," but habeas relief does not "automatically issue if a prisoner satisfies the AEDPA standard." *Horn v. Banks*, 536 U.S. 266, 272 (2002). By showing the state court

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[21] Similarly, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

decision was "contrary to" clearly established federal law, the prisoner surmounts AEDPA, and the federal habeas court "must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *see also Williams*, 529 U.S. at 406 (explaining that if "the state-court decision falls within" the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *Milton v. Miller*, 744 F.3d 660, 670–71 (10th Cir. 2014) (concluding OCCA's decision was "contrary to" clearly established federal standard and reviewing claim de novo).

As previously mentioned, we choose to assume that AEDPA supplies our standard of review and now turn to the substantive law governing Indian country jurisdiction.

B. Indian Country Jurisdiction

Understanding the Indian country jurisdiction issue in this case requires background knowledge about (1) reservations, (2) the Major Crimes Act, (3) the meaning of "Indian country," and (4) how a reservation can be disestablished or diminished. We address these topics below.

1. Reservations

The federal government began creating Indian reservations during the nineteenth century. *See* Felix S. Cohen's Handbook of Federal Indian Law 60 (Nell Jessup Newton ed., 2012) [hereinafter "Cohen"]. "During the 1850s, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." *Id.* at 190 91. "[T]he term ['Indian reservation'] has come to describe federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction."

Indian Country, U.S.A., 829 F.2d at 973 (citation and quotations omitted). As we explain further below, the term "Indian country" includes not only reservations but other lands as well.

2. The Major Crimes Act

The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in "Indian country." When the Major Crimes Act applies, jurisdiction is exclusively federal. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction." (quotations omitted)); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) ("The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian country."); *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." (quotations omitted)). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

The current version of the Major Crimes Act provides in relevant part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). If the Major Crimes Act applies to an Indian defendant, he or she "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242.

The parties agree that Mr. Murphy and Mr. Jacobs, both members of the Creek Nation, qualify as Indians for purposes of the Major Crimes Act. *See* 124 P.3d at 1200; *see also* Aplt. Br. at 20; Aplee. Br. at 11.[22] Murder is among the Act's enumerated offenses. *See* 18 U.S.C. § 1153(a). The dispute centers on whether the crime occurred in Indian country, in particular on the Creek Reservation. Before we discuss the meaning of Indian country, we provide the following history of the Major Crimes Act because it aids our analysis.

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that federal and territorial courts lacked jurisdiction to try an Indian for the murder of another Indian committed in Indian country. *Id.* at 572. In response, Congress passed the Major Crimes Act in 1885. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385; *Keeble v. United States*, 412 U.S. 205, 209–10 (1973) (discussing *Ex parte Crow Dog* and legislative response). As originally enacted, the Major Crimes Act provided:

> [A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder . . . within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes

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[22] Whether the Major Crimes Act applies does not depend on whether the victim is an Indian. *See* 18 U.S.C. § 1153(a) (reaching crimes against an Indian "or other person").

> . . . ; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

§ 9, 23 Stat. at 385. Thus, unlike the current law, which applies in "Indian country," the original Act applied to crimes committed in federal territories and "within the boundaries of any State of the United States, and within the limits of any Indian *reservation*." *Id.* (emphasis added); *see also United States v. Kagama*, 118 U.S. 375, 377–78, 383–85 (1886) (discussing original Act and upholding its constitutionality).

In cases decided in the late nineteenth and early twentieth centuries, the Supreme Court explained that the Major Crimes Act applied to crimes committed within the boundaries of Indian reservations regardless of the ownership of the particular land on which the crimes were committed. *See United States v. Celestine*, 215 U.S. 278, 284–87 (1909); *United States v. Thomas*, 151 U.S. 577, 585–86 (1894). The Court explained in *Celestine* that reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries: "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." 215 U.S. at 285. This understanding of reservations has continued. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian

Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." (citing *Celestine*, 215 U.S. at 285)).

3. Indian Country

In 1948, Congress amended the Major Crimes Act and codified the definition of "Indian country." *See* Act of June 25, 1948, ch. 645, 62 Stat. 683, 757; *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 528–30 (1998) (discussing term's case-law origins); Cohen at 189–90 (discussing codification). Within the definition, Congress included the boundaries-based concept of reservations that had developed in the case law under the Major Crimes Act.[23] Under 18 U.S.C. § 1151, "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

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[23] Before the 1948 codification, Congress in 1932 had also provided that the Major Crimes Act would apply to enumerated crimes committed by Indians "on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation." Act of June 28, 1932, 47 Stat. 336, 337.

> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (paragraph breaks added).[24] If an area qualifies under any of these definitions, it is Indian country. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); *see also Indian Country, U.S.A.*, 829 F.2d at 973 ("A formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status."). *Id.*

At the same time Congress enacted this definition of Indian country, it also amended the Major Crimes Act so that it would apply in Indian country as defined in the statute. *See* 62 Stat. at 758. Thus, the Major Crimes Act now applies in all of Indian country, *see* 18 U.S.C. § 1153(a), not only reservation land.

Within § 1151's definition of Indian country, the § 1151(a) reservation clause concerns us here. Congress provided that "Indian country" includes "*all land within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a) (emphasis added). Thus, land within the boundaries of an Indian reservation is in "Indian country."

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[24] "Indian country" carries a different meaning for certain laws relating to intoxicants. *See* 18 U.S.C. §§ 1154, 1156; *see also* 18 U.S.C. § 1151 (defining "Indian country" "[e]xcept as otherwise provided in sections 1154 and 1156 of this title"). These exceptions are not relevant here.

The Supreme Court confirmed this understanding in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In that case, an Indian sought federal habeas relief after being convicted in Washington state court of burglary, one of the Major Crimes Act's enumerated offenses. *See* 18 U.S.C. § 1153(a); *see also Seymour*, 368 U.S. at 352 n.2. He argued the United States had exclusive jurisdiction because the crime occurred within an Indian reservation and therefore within Indian country. *See* 368 U.S. at 352–54. The State of Washington argued that even though the crime occurred on land within the reservation's borders, the particular parcel was owned by a non-Indian. *See id.* at 357. Ruling for the Indian petitioner, the Supreme Court said Congress's definition of Indian country in § 1151(a) "squarely put to rest" this argument. *Id.* "Since the burglary with which [the defendant] was charged occurred on property plainly located within the limits of [the] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.* at 359. Under § 1151(a), therefore, all lands within the boundaries of a reservation have Indian country status.

4. Reservation Disestablishment and Diminishment

Only Congress can disestablish or diminish a reservation.[25] In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court said Congress has the

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[25] The terms "disestablished" and "diminished" "have at times been used interchangeably," but "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999). Here, the State argues Congress disestablished the Creek Reservation.

power to unilaterally abrogate treaties made with Indian tribes. *Id.* at 566. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This includes the power to eliminate or reduce a reservation against a tribe's wishes and without its consent. *See Solem*, 465 U.S. at 470 n.11 (explaining the *Lone Wolf* Court "decided that Congress could diminish reservations unilaterally"). Because "only Congress can alter the terms of an Indian treaty by diminishing a reservation," the Supreme Court has said the "touchstone" of whether a reservation's boundaries have been altered is congressional purpose. *Yankton Sioux Tribe*, 522 U.S. at 343; *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) ("The focus of our inquiry is congressional intent.").

Having recognized Congress's power to disestablish and diminish Indian reservations, the Supreme Court also has developed a framework to determine whether Congress has exercised its power with respect to a given reservation. We next discuss (a) the presumption against disestablishment and diminishment, (b) Congress's pursuit of a policy called allotment and its relationship to reservation borders, and (c) the Supreme Court's three-part *Solem* test for determining whether Congress has altered a reservation's boundaries.

a. Presumption against disestablishment and diminishment

Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. *See DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975) ("[The Supreme] Court does not lightly conclude that an

Indian reservation has been terminated."). Indeed, the Supreme Court has said courts must approach these issues with a "presumption" that Congress did not intend to disestablish or diminish a reservation. *Solem*, 465 U.S. at 481; *see also Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988) ("With regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation."). [26] Congress can do so, but its intent "must be 'clear and plain.'" *Yankton Sioux Tribe*, 522 U.S. at 343 (quoting *United States v. Dion*, 476 U.S. 734, 738–39 (1986)); *see also Solem*, 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries before diminishment will be found" (quotations omitted)); *id.* at 476 (discussing a statute's lack of "explicit expression of congressional intent to diminish" and finding reservation preserved); *DeCoteau*, 420 U.S. at 444 ("[The Supreme Court] requires that the congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (ellipsis in original) (quotations omitted)).

b. The policy of allotment

The Supreme Court's test, discussed below, for determining whether Congress intended to disestablish or diminish a reservation developed after Congress pursued a policy known as allotment.

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[26] The presumption against reservation disestablishment and diminishment accords with the general principle that an intent "to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (quotations omitted); *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993).

Following decades of setting aside "large sections of the western States and Territories . . . for Indian reservations," Congress in the late nineteenth century adopted "the view that the Indians tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land." *Solem*, 465 U.S. at 466. [27] This policy involved Congress dividing, or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members. Not incidentally, the policy also "open[ed] up unallotted lands for non-Indian settlement," allowing these "surplus" lands to be sold to non-Indians. *Id.* at 467. Laws designed "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement" are often referred to as "surplus land acts." *Id.*

Allotment on its own does not disestablish or diminish a reservation. *See Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (explaining allotment can be "completely consistent with continued reservation status"). But Congress, in passing surplus land acts, has altered the boundaries of some reservations. *See Solem*, 465 U.S. at 469 ("[S]ome surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)).

Congress pursued the allotment policy on a national scale in the 1887 General Allotment Act. *See* Act of

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[27] Or, as the Supreme Court described the policy at the time, "Of late years a new policy has found expression in the legislation of Congress,[] a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes . . . ." *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591, 601 (1916).

Feb. 8, 1887, ch. 119, 24 Stat. 388.[28] That law, however, did not affect all Indian tribes and reservations. The Creek Nation was not included in the General Allotment Act. *See* § 8, 24 Stat. at 391. By the early twentieth century, "Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

During the allotment era, Congress "anticipated the imminent demise" of reservations. *Id.* at 468; *see also id.* ("[M]embers of Congress voting on the surplus land acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist."); *see also Yankton Sioux Tribe*, 522 U.S. at 343 (explaining Congress "assumed that the reservation system would fade over time").

The Supreme Court has said this general hostility to reservations and Indian communal life does not establish that a particular reservation was disestablished:

> Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it

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[28] The policy of the General Allotment Act, the Supreme Court has said, "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz*, 412 U.S. at 496.

> is settled law that some surplus land acts diminished reservations, and other surplus land acts did not.

Solem, 465 U.S. at 468–69 (citations omitted); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (explaining congressional belief "that all reservations would be temporary is irrelevant in determining whether the boundaries of a *specific* reservation were being diminished by the language of a given statute"). Whether there was "a specific congressional purpose" to disestablish or diminish a particular reservation "depends on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. To distinguish congressional acts that changed a reservation's borders from those "that simply offered non-Indians the opportunity to purchase land within established reservation boundaries," the Supreme Court has developed a three-part framework. *Id.* at 470.

c. *Solem* factors

In *Solem v. Bartlett*, a member of the Cheyenne River Sioux Tribe sought habeas relief after a state court in South Dakota convicted him of attempted rape. *Id.* at 465; *see also id.* at 465 n.2 (explaining offense fell within Major Crimes Act). The defendant argued the state court lacked jurisdiction because the crime occurred on the reservation. *Id.* The Supreme Court developed and applied its three-part framework to assess whether the reservation had been diminished. *See id.* at 470–80. It concluded the reservation had not been diminished and granted habeas relief because the federal government had exclusive jurisdiction. *Id.* at 481. *Solem*'s three factors are as follows:

First, *Solem* instructs courts to examine the text of the statute purportedly disestablishing or diminishing

the reservation. Statutory language is "[t]he most probative evidence of congressional intent." *Id.* at 470. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is combined with language committing Congress to compensate the tribe for its land with a fixed sum, Congress's intent to diminish a reservation is especially clear. *Id.* at 470–71. No "particular form of words," however, is necessary to diminish a reservation. *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

Second, *Solem* requires courts to consider "events surrounding the passage" of the statute. 465 U.S. at 471. Even when the statutory language "would otherwise suggest reservation boundaries remained unchanged," the Court has been willing to find that Congress altered the borders if evidence at step two "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* Step-two contemporary historical evidence includes "the manner in which the transaction was negotiated with the tribes . . . and the tenor of legislative reports presented to Congress." *Id.*

Third, *Solem* considers, though "[t]o a lesser extent," "events that occurred after the passage" of the relevant statute. *Id.* This evidence can include "Congress's own treatment of the affected areas" as well as "the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.* Later demographic history—evidence of "who actually moved onto opened reservation lands"—also offers a "clue as to what Congress expected would

happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471–72.

In conducting this three-part inquiry, "[t]here are . . . limits to how far" courts can "go to decipher Congress's intention in any particular surplus land act." *Id.* at 472. "Throughout the inquiry," courts must "resolve any ambiguities in favor of the Indians" and remember that disestablishment and diminishment are not to be lightly found. *Hagen*, 510 U.S. at 411. The "rule by which legal ambiguities are resolved to the benefit of the Indians" is applied to its "broadest possible scope" in disestablishment and diminishment cases. *DeCoteau*, 420 U.S. at 447. Absent "substantial and compelling evidence" courts are "bound by . . . traditional solicitude for the Indian tribes" to conclude "that the old reservation boundaries survived." *Solem*, 465 U.S. at 472.

* * * *

Having addressed AEDPA, the substantive law of Indian country jurisdiction, and reservation disestablishment and diminishment, we turn now to our analysis.

III. DISCUSSION

Our analysis addresses three issues:

(A) Whether there was clearly established federal law as determined by the Supreme Court when the OCCA addressed Mr. Murphy's jurisdictional claim. We conclude the *Solem* framework constituted clearly established law.

(B) Whether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy's jurisdictional claim. We conclude that it did because the OCCA failed to apply the *Solem* framework and took an approach incompatible with it.

(C) Whether the federal government has exclusive jurisdiction over Mr. Murphy's case. We conclude that it does because, under the *Solem* framework, Congress has not disestablished the Creek Reservation.

Because the crime occurred in Indian country, Oklahoma lacked jurisdiction. We therefore reverse the district court's denial of habeas relief and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254.

A. Clearly Established Federal Law

Our first inquiry under § 2254(d)(1) is whether clearly established federal law governed Mr. Murphy's claim. *See House*, 527 F.3d at 1015. The OCCA issued its jurisdictional decision on December 7, 2005. *See Murphy*, 124 P.3d 1198. Our survey of clearly established federal law is therefore limited to decisions of the Supreme Court before that date. *See* 28 U.S.C. § 2254(d)(1); *Greene*, 565 U.S. at 38. We conclude the three-part *Solem* framework supplied the OCCA with clearly established federal law to decide Mr. Murphy's claim.

1. *Solem*—Clearly Established Law in 2005

The Supreme Court decided *Solem* in 1984, more than two decades before the OCCA decided Mr. Murphy's case. Even in 1984, the *Solem* Court recognized the three-part framework it applied was not a new development in the law. The *Solem* Court explained its precedent had already "established a fairly clean analytical structure" for deciding whether Congress altered a reservation's borders. 465 U.S. at 470. The Court's pre-*Solem* decisions relied on the factors discussed in *Solem* to assess reservation disestablishment and diminishment. *See Rosebud Sioux Tribe*, 430 U.S. at 587 (reservation diminished);

DeCoteau, 420 U.S. at 427–28 (reservation disestablished); *Mattz*, 412 U.S. at 505 (reservation not disestablished); *Seymour*, 368 U.S. at 359 (reservation not disestablished); *see also Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1476 n.30 (10th Cir. 1987) ("Although the Tribe refers to *Solem* as 'significant new authority,' *Solem* is rather one of a line of cases construing the dimensions of 'Indian country.'" (citation omitted)).

Between 1984 when *Solem* was decided and 2005 when the OCCA issued its decision in Mr. Murphy's case, the Supreme Court did nothing to call *Solem* into doubt. Rather, it reaffirmed *Solem*'s three-part framework and applied it to other reservations in the 1990s. *See Yankton Sioux Tribe*, 522 U.S. at 333, 344 (discussing three factors and concluding reservation was diminished); *Hagen*, 510 U.S. at 410–11, 421 (concluding Congress diminished reservation and explaining *Solem* directs courts "to look to three factors").

In the years before the OCCA's decision, federal appeals courts, including this court, recognized *Solem* provided the governing framework. *See, e.g.*, *Shawnee Tribe v. United States*, 423 F.3d 1204, 1221 (10th Cir. 2005) (discussing *Solem* and explaining that "we look to three factors to determine whether a reservation's boundaries have been altered"); *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (identifying *Solem* as "well established Supreme Court precedent"); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022–23 (8th Cir. 1999) (explaining *Solem* provides "the standard rules of interpretation"); *Yazzie*, 909 F.2d at 1395 ("The current analytic structure has been summarized in *Solem*."). So did state high courts. *See, e.g.*, *State v. Greger*, 559 N.W.2d 854, 860–61 (S.D. 1997) (explaining *Hagen* retained *Solem*'s "traditional approach to diminishment questions"); *State v. Davids*, 534 N.W.2d

70, 72 (Wis. 1995) (noting *Solem* Court "identif[ied] the governing principles of diminishment"); *State v. Perank*, 858 P.2d 927, 935–36 (Utah 1992) (reciting *Solem* framework as governing law).

The Supreme Court has recognized that a legal framework for evaluating a given type of claim can constitute clearly established law under § 2254(d)(1). For example, the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), announced a two-part test for evaluating claims of ineffective assistance of counsel, *see id.* at 687 (discussing performance and prejudice), and the Court has since said this framework constitutes clearly established law, *Williams*, 529 U.S. at 391 (controlling opinion of Stevens, J.) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" (quoting 28 U.S.C. § 2254(d)(1))). Although claims of lawyer ineffectiveness are each unique and require fact-intensive analysis, *Strickland*'s framework still applies, and the variety of fact patterns "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the Supreme] Court." *Id.*

We conclude *Solem*'s three-part framework for evaluating whether Congress has disestablished or diminished an Indian reservation was clearly established when the OCCA rendered its decision. The State's arguments to the contrary miss the mark.

2. The State's Arguments

The State acknowledges the Supreme Court has applied the *Solem* framework to "surplus land acts, which provided for the sale of large areas of land for white settlement," but it argues that, with respect to the Creek Nation, Congress allotted almost all of the

Reservation to tribal members. Aplee. Br. at 46–47. This point has nothing to do with whether the *Solem* framework applies, though it does suggest Congress did not intend to disestablish the Creek Reservation. The State offers no explanation for why the proportion of land allotted to tribal members relative to the land opened to non-Indian settlement makes a difference to whether *Solem* applies. In making its disestablishment case, the State relies on statutes that allotted the Creek Reservation, and we discuss these laws below. Those statutes, like the statute in *Solem*, "force[d] Indians onto individual allotments carved out of [a] reservation[] and . . . open[ed] up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. Whether Congress disestablished the Creek Reservation through those statutes is the kind of question the *Solem* framework was built to answer.

The State also argues that Congress, in addition to allotting Creek lands, "took a number of steps toward[] the complete abolition of the Creek Nation as a political entity." Aplee. Br. at 46; *see also id.* at 47. Below, we consider the State's arguments about political dissolution as they relate to reservation disestablishment. But the State offers no explanation or legal authority for why legislation dealing with a tribe's political status would make the *Solem* framework anything less than clear when it comes to reservation disestablishment—the issue before us.

Despite its arguments that there is no clearly established law, the State's brief recognizes *Solem* is controlling. It defends the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test. Nowhere does the State argue that some other legal framework applies.

* * * *

Because clearly established Supreme Court law governs Mr. Murphy's Indian country jurisdictional claim, we proceed to the next step of the § 2254(d)(1) inquiry: whether the OCCA rendered a decision that was "contrary to" the *Solem* framework.

B. The OCCA Decision—Contrary to Clearly Established Federal Law

Before we address whether the OCCA's decision was "contrary to" *Solem*, we consider—and reject—Mr. Murphy's threshold argument that the OCCA failed to adjudicate his reservation claim on the merits. We then consider whether the OCCA's merits decision was "contrary to" the clearly established *Solem* framework discussed above. We conclude it was.

1. The OCCA's Merits Decision

The following is the entirety of the OCCA's discussion of the jurisdictional issue with respect to the Reservation:

> The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community.[29] Unfortunately, the District Court decided, based upon the Assistant

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[29] As already mentioned, Mr. Murphy pursued three theories for Indian country jurisdiction before the OCCA. This part of the OCCA's discussion addressing Mr. Murphy's reservation argument under § 1151(a) followed its rejection of his allotment theory under § 1151(c). We omit the OCCA's discussion of the "dependent Indian community" theory under § 1151(b) because that issue is not before us. And although Mr. Murphy again raises the allotment theory in this appeal, we do not reach that issue because we agree with him that the crime occurred within the Creek Reservation.

District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.

Be that as it may, the error was alleviated when the District Court allowed Petitioner's[30] counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.

Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."[31]

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[30] The OCCA referred to Mr. Murphy as "Petitioner."

[31] As part of his offer of his proof on the reservation issue, Mr. Murphy submitted an affidavit from Ms. Blackwell, an attorney with more than two decades of experience practicing Indian law with the U.S. Department of the Interior. *See* Blackwell Aff. ¶¶ 3–4, State Post-Conviction Record, Vol. 1 at 151. Ms. Blackwell stated the tract of land where the crime occurred "falls within the territorial boundaries of the Muscogee (Creek) Nation." *Id.* ¶ 13. As the OCCA pointed out, she stated "[t]here was never a formal Creek Nation 'reservation'" because the Creek

Ms. Blackwell and Jeff Dell[32] both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]

> 18 It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.

The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 975, which treats the Creek Nation lands as a "reservation" as of 1866.[19] However, the Tenth Circuit declined to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning

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Nation had "acquired the land at issue in this case through treaty with the United States." *Id.* ¶ 14. But there is no dispute that the Creek Nation had a reservation; the State agrees it was intact in 1900, *see* Aplee. Br. at 75 n.25. Rather, the dispute is whether Congress has disestablished the Creek Reservation. In Ms. Blackwell's opinion, "[t]he exterior territorial boundaries of the Creek Nation were not altered" by congressional acts around the turn of the twentieth century. Blackwell Aff. ¶ 21. She concluded "the Muscogee (Creek) Nation has not been disestablished" and that "regardless of title ownership as Indian or non-Indian, the [tract where the crime occurred] is Indian country within the meaning of Federal Law." *Id.* ¶ 22.

[32] Mr. Dell, "an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State." 124 P.3d at 1203.

> allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.
>
> > 19 The case finds the term "reservation," for purposes of defining Indian country, "simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." 829 F.2d at 973.
>
> If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

Murphy, 124 P.3d at 1207–08 (paragraph numbers omitted).

Mr. Murphy, focusing mainly on the court's last sentence, argues the OCCA refused to adjudicate his reservation claim on the merits. The State maintains the OCCA decided the reservation issue on the merits because it considered Mr. Murphy's evidence, found it insufficient, and denied relief.

Whether the OCCA adjudicated the jurisdictional claim "on the merits" as that phrase is used in 28 U.S.C. § 2254(d) determines our standard of review. As discussed above, we have chosen to assume (without deciding) that AEDPA applies to jurisdictional claims of the type Mr. Murphy raises. But even when a type of claim can qualify for AEDPA review, federal courts do not apply AEDPA deference when the state court did not adjudicate the specific claim "on the merits." *See Cone v. Bell*, 556 U.S. 449, 472 (2009); *Stouffer v. Duckworth*, 825 F.3d 1167, 1179 (10th Cir. 2016) ("[I]f the state court did not decide the claim on the merits, the stringent principles of deference under 28 U.S.C. § 2254 are inapplicable." (quotations omitted)), *cert. denied*, 137 S. Ct. 1226 (2017). If the

state court did not adjudicate the claim "on the merits," there is no decision to which the federal court can defer. *See Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013) (explaining that, when AEDPA does not apply, "[w]e consider legal questions de novo and factual findings, if any, for clear error").

The Supreme Court has explained that a state court's decision is "on the merits" even when it denies the prisoner's claim "without an accompanying statement of reasons." *Richter*, 562 U.S. at 92. Indeed, "it may be *presumed* that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99 (emphasis added); *see also Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094–96 (2013). Thus, outside of the "unusual circumstances" when the presumption of a merits adjudication is rebutted, *Johnson*, 133 S. Ct. at 1096, federal habeas relief is available to state prisoners only under the limited circumstances stated in § 2254(d).

Although the OCCA's opinion gives both sides something to draw on, we agree with the State that the court rendered a merits decision.[33] The OCCA remarked in conclusion that it "refuse[d] to step in," 124 P.3d at 1208, but Mr. Murphy's argument ignores the rest of the OCCA's discussion in which the court discussed his offer of proof on the reservation issue and said his argument was unpersuasive. We do not read the OCCA's final sentence as a refusal to decide the reservation question at all but rather as a refusal to decide it in Mr. Murphy's favor. Even if Mr. Murphy's reading is plausible, ambiguity is insufficient to overcome the presumption that the OCCA's adjudication

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[33] Because we agree with the State, we need not address its alternative contention that Mr. Murphy waived his merits-determination argument.

was on the merits. *See Richter*, 562 U.S. at 92 (discussing presumption of merits adjudication). Thus, because the OCCA's adjudication of the reservation issue was on the merits, AEDPA applies and Mr. Murphy cannot receive habeas relief withoutshowing the OCCA's decision meets the standard set out in § 2254(d). *See Lay v. Royal*, 860 F.3d 1307, 1317 (10th Cir. 2017) ("Because the OCCA addressed the merits . . . we may only grant habeas relief if we find that the OCCA's decision was contrary to . . . settled federal law . . . ." (citation omitted)). We turn to that question next.

2. The OCCA's Decision Was Contrary to *Solem*

Mr. Murphy argues that, if the OCCA decided the reservation jurisdiction issue, its decision was "contrary to" clearly established Supreme Court authority. We agree.

a. No citation to *Solem*

Nowhere in its discussion of the reservation issue—nor anywhere else in its opinion—did the OCCA cite *Solem*, *Hagen*, *Yankton Sioux Tribe*, or any of the Supreme Court's other Indian reservation disestablishment precedent.[34] This failure to cite governing law, however, does not on its own mark the OCCA decision as "contrary to" that law. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam) ("A state court's decision is not contrary to clearly established Federal law simply because the court did not cite [the Supreme Court's] opinions." (alterations and quotations omitted)). State courts can apply clearly established federal law without citing to it. *See Early v.*

[34] The OCCA included *Rosebud Sioux Tribe*, 430 U.S. 584, in one footnoted string citation, but it was in the context of the allotment issue, not the reservation question. *See* 124 P.3d at 1205 n.14.

Packer, 537 U.S. 3, 8 (2002) (per curiam). Indeed, AEDPA "does not even require [state court] *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

Here, the OCCA did not merely fail to cite controlling Supreme Court authority, it failed to apply it, and in deviating from *Solem*, the OCCA's reasoning contradicted clearly established law.

b. Failure to apply *Solem*

Setting aside the absence of citations, the substance of the OCCA's analysis lacks even cursory engagement with any of the three *Solem* factors. The OCCA did not evaluate any statute to see if Congress had disestablished the Creek Reservation. It also did not evaluate the historical context of any laws. Nor did the OCCA evaluate later treatment of the area in question or demographic history. The OCCA's decision failed to apply the required legal standard to the facts.

What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had *not* been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, the OCCA improperly required Mr. Murphy to show the Creek Reservation had *not* been disestablished instead of requiring the State to show that it had been. This "contradicts" governing law. *Williams*, 529 U.S. at 405 (controlling opinion of O'Connor, J.); *see id.* ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."); *see also*

Lafler v. Cooper, 566 U.S. 156, 173 (2012) ("[T]he [State] Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. . . . By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law."). The OCCA applied the wrong law.

Instead of applying the *Solem* factors, the OCCA looked for federal court decisions holding that the Reservation continues to exist. This yielded the OCCA's single citation to legal authority—our decision in *Indian Country, U.S.A.*, which was not a disestablishment case. *See* 829 F.2d at 975 ("In the present case, we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished."). The OCCA called *Indian Country, U.S.A.*, the "best authority" for the position that there is still a Creek Reservation. 124 P.3d at 1207. Indeed, we held there *is* still a Creek Reservation, but we had no occasion to determine whether the Reservation's 1866 boundaries remained intact. *See* 829 F.2d at 975 n.3, 976 (holding lands at issue "still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)"); *id.* at 980 n.5 (setting aside boundary question).

The Supreme Court has occasionally faulted federal habeas courts for concluding state courts issued decisions that were "contrary to" federal law when the federal court failed to give the "benefit of the doubt" to the state court. *See, e.g.*, *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). In those cases, state courts properly articulated the governing legal test in one part of their opinions but went on to misstate the standard or give the impression that what was actually applied deviated from binding

federal law. *See Holland*, 542 U.S. at 654; *Woodford*, 537 U.S. at 22–24.

This is not one of those cases. The OCCA failed to articulate or apply the proper legal framework anywhere in its opinion, and its analysis is incompatible with the *Solem* framework. At oral argument, we questioned the State about whether the OCCA had applied *Solem*:

> THE COURT: Is there anything to indicate [the OCCA] applied [*Solem*]? Anything? Did they mention steps one, two, and three?
>
> THE STATE: They did not, Your Honor.
>
> THE COURT: Did [the OCCA] say anything that would fit in steps one, two, and three?
>
> THE STATE: They—No.

Oral Arg. at 46:00–46:13. The State argues the OCCA's decision was not contrary to *Solem*. But the OCCA applied the wrong law in adjudicating Mr. Murphy's reservation claim. Its adjudication was "contrary to" clearly established law.

c. The State's arguments

The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did *not* intend disestablishment." Aplee. Br. at 48 (emphasis added). But under *Solem*, that is not the test. *Solem* and every case applying it presume that a reservation continues to exist unless Congress has legislated otherwise. As demonstrated above, the OCCA not only ignored but also reversed this presumption. So does the State. We will not make the same mistake here.

The State further argues that Mr. Murphy "bears the burden of establishing federal jurisdiction, and the

burden under AEDPA." *Id.* Of course, the burden of showing federal jurisdiction—our jurisdiction in this proceeding—is on Mr. Murphy. He has carried that burden. Our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A), because he secured COAs for the issues on appeal. And his burden under AEDPA is to show that the OCCA rendered a decision that was "contrary to" clearly established federal law. He has.

The State also argues that our deference to the OCCA should be "at its apex" when the clearly established law states a general standard. Aplee. Br. at 52. Although the State is correct that "the more general the rule at issue . . . the more leeway state courts have in reaching outcomes in case-by-case determinations," *Renico v. Lett*, 559 U.S. 766, 776 (2010) (brackets and quotations omitted), and although we further agree *Solem* supplies a general standard meant for application to various disestablishment and diminishment cases, these principles do not entitle the OCCA's decision to deference. The State's argument concerns § 2254(d)(1)'s "unreasonable application" clause, but that clause does not come into play here because, to benefit from the wide berth federal courts give state courts in applying general standards, the state court must actually apply the standard. *See Eizember v. Trammell*, 803 F.3d 1129, 1140 (10th Cir. 2015) ("The Supreme Court has long recognized that a state court's identification of the correct governing legal standard and the reasonableness of its application of that standard to the facts are two distinct statutory inquiries."). The OCCA did not unreasonably apply *Solem*; it didn't apply it at all.

The State reminds us that our review under AEDPA is limited to the record before the OCCA. But we have no need to expand the record. The State acknowledges that the state-court evidentiary hearing determined

Mr. Murphy's status as an Indian as well as the precise location of the crime. The OCCA relied on these facts, and we do not question them. Our analysis requires us only to compare the OCCA's adjudication of Mr. Murphy's claim with the Supreme Court's clearly established law. That comparison reveals the OCCA's decision is contrary to *Solem*.

Mr. Murphy put the issue of whether the Creek Reservation had been disestablished squarely before the OCCA, but the court decided the claim by ignoring and contradicting *Solem*. Its decision was thus "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Consequently, we must review his jurisdictional claim without AEDPA deference. *See Milton*, 744 F.3d at 670–71 (explaining that "satisfaction of the § 2254(d)(1) standard" does not entitle the prisoner to habeas relief but it does "effectively remove[] AEDPA's prohibition on the issuance of a writ"). We now apply the *Solem* framework to analyze Mr. Murphy's jurisdictional claim.

C. Exclusive Federal Jurisdiction

Mr. Murphy has overcome AEDPA's barrier to habeas relief, and we must now decide his jurisdictional claim de novo.[36] In this section, we begin by (1) addressing additional legal authority. Although our evaluation of the OCCA's decision under AEDPA was limited to clearly established Supreme Court law decided before December 2005, our de novo analysis of Mr. Murphy's claim must account for Supreme Court and Tenth

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[36] "[T]he Supreme Court has applied, without comment, a de novo standard of review in determining congressional intent regarding reservation boundary diminishment." *Wyoming v. EPA*, 849 F.3d 861, 869 (10th Cir. 2017) (brackets and quotations omitted).

Circuit authority post-dating the OCCA's decision. *See Lafler*, 566 U.S. at 173 (explaining that, when "AEDPA does not present a bar to granting" relief because the state court "failed to apply" the correct legal test, the federal habeas court "can determine the principles necessary to grant relief"); *Williams*, 529 U.S. at 406 (explaining that when a state-court decision falls within the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *see also Brown v. Uphoff*, 381 F.3d 1219, 1225 (10th Cir. 2004).[36] After addressing this recent legal authority,

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[36] Independent of AEDPA, the Supreme Court's *Teague* doctrine, *Teague v. Lane*, 489 U.S. 288 (1989), imposes another limitation on habeas relief in certain circumstances. *See Brown*, 381 F.3d at 1225–26; *see also Horn*, 536 U.S. at 272 ("[T]he AEDPA and *Teague* inquiries are distinct."). *Teague* does not pose a barrier to Mr. Murphy.

For one thing, the State does not argue that *Teague* should preclude relief. In such circumstances, "a federal court may . . . decline to apply *Teague*." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Even if we were to raise *Teague* on the State's behalf, it would not affect our analysis.

Teague provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (plurality opinion); *see also Danforth v. Minnesota*, 552 U.S. 264, 266 n.1 (2008) (explaining that "[a]lthough *Teague* was a plurality opinion . . . the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter"). "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from [the Supreme] Court has become time barred or has been disposed of." *Greene*, 565 U.S. at 39.

Teague has two exceptions. "First, the bar does not apply to rules forbidding punishment of certain primary conduct or to rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Beard v. Banks*, 542 U.S. 406, 416 (2004) (brackets and quotations omitted). "The second exception is for watershed rules of criminal procedure

we (2) recap relevant history of the Creek Nation, which provides important context for the critical period in this case—the years around the turn of the twentieth century. Finally, we (3) apply *Solem*'s three-part framework and conclude that Congress has not diminished or disestablished the Creek Reservation.

1. Additional Legal Background

We review the Supreme Court's and our court's most recent applications of *Solem*.

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implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 417 (quotations omitted).

Mr. Murphy's conviction became "final" on April 21, 2003—the date the Supreme Court denied his petition for certiorari following his direct appeal to the OCCA. *See* 538 U.S. 985. (This is before the OCCA adjudicated his jurisdictional claim on post-conviction review in 2005.) Mr. Murphy has no need for *Teague*'s exceptions because he does not seek the benefit of a rule that falls within *Teague*'s retroactivity bar. The post-2003 cases we discuss in our de novo analysis are applications of the *Solem* framework. We need not decide whether these cases qualify as "constitutional" and "procedural" under *Teague* because, even if they do, they are not "new." A case does not announce a new rule under *Teague* "when it is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (brackets and quotations omitted). "[A] rule of general application," that is, "a rule designed for the specific purpose of evaluating a myriad of factual contexts," will only "infrequent[ly] . . . yield[] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quotations omitted). When a court "appl[ies] a general standard to the kind of factual circumstances it was meant to address, [the resulting decision] will rarely state a new rule for *Teague* purposes." *Id.*; *see also id.* at 1107–08 (explaining "garden-variety applications" of the *Strickland* framework "do not produce new rules"). The post-finality cases we discuss apply the *Solem* framework to factual scenarios for which the test was developed; none of the cases created a new rule. Moreover, even if *Teague* required us to limit our analysis to pre-finality law, we would still reach the same result.

a. Supreme Court authority

In *Nebraska v. Parker*, the Supreme Court unanimously recommitted to the "well settled" *Solem* framework. 136 S. Ct. 1072, 1078 (2016). The Court held Congress did not diminish the Omaha Indian Reservation in Nebraska and that the land at issue remained part of the Reservation. *Id.* at 1082. The Court reiterated that only Congress can divest land of its reservation status "and its intent to do so must be clear." *Id.* at 1078–79. *Parker* shed light on how the *Solem* factors interact and further underscored the importance of discerning congressional intent from statutory text, which is "the first and most important step" of the *Solem* framework. *Id.* at 1080.

Before examining the 1882 statute at issue, the Court reviewed its precedent and identified "[c]ommon textual indications" of a congressional intent to alter reservation boundaries. *Id.* at 1079. "[H]allmarks of diminishment" include:

- explicit references to cession or surrender of tribal interests,
- unconditional congressional commitments to compensate the tribe with a fixed sum for the total surrender of tribal claims to opened lands, and
- provisions restoring reservation lands to "the public domain."

Id. The statute in *Parker* featured none of these hallmarks. *Id.* Rather, it provided for a government survey and appraisal of certain lands and for sales to non-Indians. *Id.* The Court contrasted the statute with earlier nineteenth century treaties between the Omaha Tribe and United States that had addressed other lands and had "terminated the Tribe's jurisdiction over their land in unequivocal terms." *Id.* at 1080

(quotations omitted). The Court concluded the 1882 statute did not diminish the Reservation's boundaries. *Id.*

Turning to the second *Solem* step, the *Parker* Court determined the "mixed historical evidence" around the law's passage could not "overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Id.* To find diminishment, step-two evidence must "'*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Id.* (emphasis added by *Parker* Court) (quoting *Solem*, 465 U.S. at 471). Floor statements by members of Congress cutting both ways, the Court ruled, "are far from the clear and plain evidence of diminishment required." *Id.* (quotations omitted).

The Court then considered step three—the later treatment of the area and its demographic history. *Id.* at 1081. Step-three evidence, the Court explained, "might reinforce a finding as to diminishment or non-diminishment based on the text" of the statute, but "never" has the Court "relied solely on this third consideration to find diminishment." *Id.* (alteration and quotations omitted).

The step-three evidence in *Parker* strongly favoring diminishment helps illustrate the significance *Solem* places in step-one statutory text. In *Parker*, "the Tribe was almost entirely absent from the disputed territory for more than 120 years." *Id.* It did not enforce any regulations in the area, nor did it "maintain an office, provide social services, or host tribal celebrations or ceremonies." *Id.* For more than a hundred years, the federal government treated the lands as belonging to Nebraska. *Id.* at 1082. Of the people living in the town on the disputed site, most were not associated with the Tribe, and, since the early twentieth century, less

than two percent of the Tribe's members lived in the disputed area. *Id.* at 1078.

This history was nonetheless insufficient, the Supreme Court said, to "overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish." *Id.* at 1082 (quotations omitted). Despite the "compelling" justifiable expectations of non-Indian settlers stemming "from the Tribe's failure to assert jurisdiction" over a long period of time, the Court held such non-Indian expectations "cannot diminish reservation boundaries." *Id.* "Only Congress has the power to diminish a reservation." *Id.* And as *Parker* makes clear, the Supreme Court looks first and foremost to statutory text when attempting to discern Congress's intent.

b. Tenth Circuit authority

This court has addressed Indian reservation disestablishment and diminishment issues on numerous occasions. *See, e.g.*, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010); *Shawnee Tribe*, 423 F.3d 1204; *Yazzie*, 909 F.2d 1387; *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *overruled by Hagen*, 510 U.S. 399.

Most recently, in *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017), we applied *Solem*'s "well-settled approach" and concluded that Congress diminished the Wind River Reservation when it enacted a 1905 agreement the federal government negotiated with the Eastern Shoshone and Northern Arapaho Tribes. *Id.* at 865, 869.

Applying the "hierarchical, three-step framework" of *Solem*, we began with the statutory text. *Id.* at 869–74. We held the following language evinced Congress's intent to diminish the Reservation:

> The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within said reservation, except the lands within and bounded by the following lines . . . .

Id. at 870 (emphasis omitted) (quoting Act of March 3, 1905, ch. 1452, 33 Stat. 1016, 1016). We called this "express language of cession" notwithstanding the absence of the words "sell" or "convey." *Id.* at 871.[37] "There are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must establish an express congressional purpose to diminish." *Id.* at 869–70 (brackets and quotations omitted).

Turning to step two—the historical context surrounding the passage of the Act—we found it "further confirm[ed] Congress intended to diminish the Wind River Reservation." *Id.* at 874 (majority opinion). A history of failed congressional attempts to sever the area north of the Big Wind River from the Reservation informed our evaluation of the eventually enacted law that accomplished that diminishment. *Id.* at 874–79.

Our analysis at step three—concerning the later treatment and demographics of the area—was "brief and ultimately d[id] not impact our conclusion." *Id.* at 879. "Unsurprisingly," from the "volumes of material" unearthed by the parties, "each side . . . managed to uncover treatment by a host of actors supporting its respective position," but because we could not "discern clear congressional intent" from the conflicting evidence, we found the later history held little value. *Id.*;

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[37] The Act elsewhere used the word "conveyed." *See id.* at 872.

see also id. at 887–88 (Lucero, J., dissenting) (agreeing with majority that step three "comes into play only at the margins" and that the post-act history was too "muddled" to provide clear evidence of congressional intent).

* * * *

This more recent case law, though unavailable to the OCCA in 2005, informs our de novo review of Mr. Murphy's claim. Indeed, we are bound by this precedent. Before turning to apply the *Solem* framework, we discuss relevant aspects of the Creek Nation's history, which provides important context for our *Solem* analysis.

2. Additional Factual Background—Creek Nation History

The following overview of the Tribe's history provides important context for the parties' arguments and our application of *Solem*.

a. Original homeland and forced relocation

The Creek Nation once exercised domain over much of present day Alabama and Georgia. *See Indian Country, U.S.A.*, 829 F.2d at 971. "In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes[38] from the southeastern United States and relocate them west of the Mississippi River, in what is today Oklahoma." *Id.*; *see also Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915) ("The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the government of the United States in the territory west of the Mississippi

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[38] "The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles historically have been referred to as the 'Five Civilized Tribes.'" *Indian Country, U.S.A.*, 829 F.2d at 970 n.2.

river does not differ greatly from that of the others of the Five Civilized Tribes . . . ."). *See generally* Cohen at 49–50 (discussing Creek Nation's forced removal).

The federal government and the Creek Nation entered into several treaties related to this forced relocation. In 1826, the Creek Nation "cede[d] to the United States" certain lands in Georgia. Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, *available at* 1826 WL 2688. In an 1832 treaty, "the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River" in present-day Oklahoma. *Indian Country, U.S.A.*, 829 F.2d at 971 (discussing Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366, *available at* 1832 WL 3599). "In a subsequent [1833] treaty regarding these lands, the United States agreed to grant 'a patent, in fee simple, to the Creek nation.'" *Id.*; *see* Treaty with the Creeks, art. 3, Feb. 14, 1833, 7 Stat. 417, 419, *available at* 1833 WL 4533. Thus, "[t]he Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States." *United States v. Creek Nation*, 295 U.S. 103, 109 (1935); *see also Woodward*, 238 U.S. at 293 ("Pursuant to treaty provisions, the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them." (citations omitted)). In sum, by the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma.

b. Nineteenth century diminishment

After the Creek Nation's relocation west, its land was diminished on multiple occasions in the mid-

nineteenth century. "In 1856, the Creeks agreed to cede to the Seminole Tribe a portion of their lands." *Indian Country, U.S.A.*, 829 F.2d at 971. In the 1856 treaty, the federal government reaffirmed the Creek Nation's title and tenure to its remaining Reservation. It guaranteed "that 'no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians,' and the United States pledged that 'no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State.'" *Id.* (quoting Treaty with the Creek and Seminole Tribes, art. 4, Aug. 7, 1856, 11 Stat. 699, 700, *available at* 1856 WL 11367).

Following the Civil War, an 1866 treaty required "the Tribe . . . to cede the western portion of its domain." *Id.* "The Creek Nation retained title to its 'reduced . . . reservation,'" which the United States promised would be "'forever set apart as a home for said Creek Nation.'" *Id.* (alteration in original) (quoting Treaty with the Creeks, arts. 3, 9, June 14, 1866, 14 Stat. 785, 786, 788, *available at* 1866 WL 18777).[39] The Creek Nation also agreed to new governance arrangements in the 1866 treaty by permitting "such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian [T]erritory,"[40] including the establishment of courts in the Indian Territory "with such

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[39] As discussed below, the Creek Nation contends the 1866 borders remain the Reservation's boundaries today.

[40] "Although most of what is today Oklahoma was once the 'Indian Territory,' after the creation of Oklahoma Territory in 1890, the phrase referred to the eastern portion of present-day Oklahoma encompassing the lands of the Five Civilized Tribes, plus lands of other tribes situated in the extreme northeastern

jurisdiction and organized in such manner as Congress may by law provide." 1866 Treaty, art. 10, 14 Stat. at 789. The Treaty also guaranteed Congress would not "interfere with or annul . . . present tribal organization, rights, laws, privileges, [or] customs." *Id.*

c. 1867 Constitution and government

"In 1867, the Creeks established a written constitutional form of government which included a separation of powers into executive, legislative and judicial branches." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988).

d. Early congressional regulation of modern-day Oklahoma

"In 1889, Congress created a special federal court of limited jurisdiction in the Indian Territory, which at that time encompassed most of present-day Oklahoma." *Indian Country, U.S.A.*, 829 F.2d at 977.

In 1890, "Congress carved the Territory of Oklahoma out of the western half of the Indian Territory." *Id.* "The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authority." *Id.* Also in 1890, "Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory." *Id.* Congress provided that certain laws from neighboring Arkansas would apply in Indian Territory, provided they were "not locally inapplicable or in conflict . . . with any law of Congress." *Id.* (quotations omitted). "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only

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corner of the state." *Indian Country, U.S.A.*, 829 F.2d at 969 n.2. "No territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Id.* at 974.

tribal members, and the incorporated laws of Arkansas did not apply to such cases." *Id.*

e. The push for allotment

"During the 1880s and 1890s, the white population within the Indian Territory grew dramatically." *Id.* at 977. "[T]he white newcomers were frustrated by the communal tenure of the Indian lands, and pressured Congress to break up the tribal land base, attach freely alienable individual title to the land, and eventually create a new state." *Id.*

As already mentioned, the objectives, among others, of this allotment policy "were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 & n.1 (1976) (discussing General Allotment Act). The General Allotment Act did not apply to the Five Civilized Tribes, *see Indian Country, U.S.A.*, 829 F.2d at 977, but by separate means Congress encouraged the Five Civilized Tribes to allot their lands.

"In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes . . . ." *Id.* "The Five Civilized Tribes, however, refused to negotiate with the Dawes Commission, and Congress—still unsure of the scope of its authority to forcibly dispose of tribal lands[41]—began to force the issue by placing restrictions on the Indian governments . . . ." *Id.*

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[41] In 1903, the Supreme Court decided Congress can unilaterally abrogate treaties with Indian nations. *See Lone Wolf*, 187

In 1897, Congress imposed several measures to force the Creek Nation's agreement to the allotment policy. Congress (1) "provid[ed] that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply irrespective of race"; (2) broadened federal court jurisdiction, thereby divesting Creek tribal courts of exclusive jurisdiction over cases involving only Creeks; and (3) subjected Creek legislation to presidential veto. *Id.* at 978 (quotations omitted).

An 1898 law, the Curtis Act, continued the campaign for allotment by "abolish[ing] the existing Creek court system and render[ing] then-existing tribal laws unenforceable in the federal courts." *Id.* It also "provided for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation*, 851 F.2d at 1441.

f. Allotment and aftermath

"In 1901, the Creek Nation finally agreed to the allotment of tribal lands." *Indian Country, U.S.A.*, 829 F.2d at 978. The 1901 Original Allotment Agreement ("Original Agreement" or "Agreement") provided: "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe . . . so as to give each an equal share of the whole in value . . . ." Original Agreement, ch. 676, ¶ 3, 31 Stat. 861, 862 (Mar. 1, 1901). "Although the vast majority of Creek Nation lands were allotted or sold, some lands remained in tribal ownership under the original treaty-based fee patents." *Indian Country, U.S.A.*, 829 F.2d at 978. The Agreement exempted certain lands from allotment, such as railroad sites and lands for Creek schools and

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U.S. at 566–68; *see also Parker*, 136 S. Ct. at 1081 n.1; *Woodward*, 238 U.S. at 294, 304–05; Cohen at 198 & n.121.

courthouses. ¶ 24, 31 Stat. at 868. It also allowed some non-Indians to purchase lands within town sites. *See* ¶¶ 10–11, 31 Stat. at 865–66. In 1902, a Supplemental Allotment Agreement ("Supplemental Agreement") made certain amendments. *See generally* Supplemental Agreement, ch. 1323, 32 Stat. 500 (June 30, 1902).[42]

The Original Agreement, in addition to providing for allotment, addressed governance. It made clear the Creek courts, already abolished in 1898, were not being reestablished. ¶ 47, 31 Stat. at 873. The Agreement continued presidential review of Creek laws "affecting the lands of the tribe, of individuals after allotment." ¶ 42, 31 Stat. at 872. Further, it anticipated the total elimination of the Creek government: "The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper." ¶ 46, 31 Stat. at 872.

As the termination date approached, however, "much remained to be done." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1126 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "[I]t was apparent that the affairs of the tribes could not be wound up by the date set," and "Congress in early 1906 debated and enacted the 'Five Tribes Act.'" *Id.* (citing ch. 1876, 34 Stat. 137 (Apr. 26, 1906)).

In the Five Tribes Act, "Congress expressly delayed any plans to terminate the tribes, and provided that the tribal governments 'are hereby continued in full force and effect.'" *Indian Country, U.S.A.*, 829 F.2d at 978 (quoting § 28, 34 Stat. at 148). Congress never

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[42] We discuss these statutes in greater detail below as part of our step-one *Solem* analysis.

dissolved the Creek government; it has enjoyed continuous and uninterrupted existence. Even while Congress contemplated the future dissolution of the tribal government, the Creek Nation continued to exercise taxing authority within its boundaries as confirmed by a decision of the Eighth Circuit, our predecessor court, which then had jurisdiction over the Indian Territory. *See Buster v. Wright*, 135 F. 947, 951–52 (8th Cir. 1905) (concluding the Creek Nation retained power "to fix the terms upon which noncitizens might conduct business within its territorial boundaries" and had not "los[t] the power to govern the people within its borders"), *appeal dismissed*, 203 U.S. 599 (1906).

g. Creation of Oklahoma

Months after preserving and extending the Creek tribal government in 1906, Congress passed the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (June 16, 1906). It allowed the Territory of Oklahoma, together with the Indian Territory, to apply for statehood. This law and its 1907 amendment "provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States." *Indian Country, U.S.A.*, 829 F.2d at 978. In addition, new state courts "were to succeed the Indian territory courts with respect to the remaining nonfederal cases." *Id.* "The enabling act also provided that 'the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State.'" *Id.* (emphasis omitted) (quoting § 13, 34 Stat. at 275). "Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim all right and title to such lands." *Id.* (quotations omitted). Oklahoma entered the Union

in 1907. *See* Proclamation, 35 Stat. 2160–61 (Nov. 16, 1907).

h. Away from allotment

The 1930s saw another shift in federal policy as "Congress repudiated the practice of allotment" and passed the Indian Reorganization Act ("IRA"). *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001). *See generally* Cohen at 79–84. The IRA, enacted in 1934, revitalized tribal "self-government pursuant to constitutions" and allowed "tribes to organize for economic purposes pursuant to corporate charters." *Muscogee (Creek) Nation*, 851 F.2d at 1442. The Creek Nation was excluded from the IRA, but, two years later in 1936, Congress passed the Oklahoma Indian Welfare Act ("OIWA"), which covered the Creek Nation and, "like the IRA, provided for constitutional governments and corporate charters." *Id.*; *see* OIWA, ch. 831, 49 Stat. 1967 (June 26, 1936).

In a 1943 case concerning Oklahoma real estate taxes, the Supreme Court acknowledged the Creek Nation's continuing vitality: "Thus far Congress has not terminated [its guardianship] relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers." *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (citations and footnote omitted) (citing OIWA). In sum, following allotment, Congress re-empowered the Creek Nation's government, which it had never dissolved.

i. Public Law 280

Policy shifted again in the post-World War II period, known as the "termination era," as Congress focused on assimilating Indians and ending the United States' trust relationship with many Indian tribes. *See* Cohen at 92–93.

One important law enacted in 1953, "Public Law 280," addressed state jurisdiction. It allowed some states "to assert limited civil and broad criminal jurisdiction in Indian country." *Indian Country, U.S.A.*, 829 F.2d at 980 (citing ch. 505, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, 28 U.S.C. § 1360)). Public Law 280, "delegat[ed] to five, later six, states jurisdiction over most crimes . . . throughout most of the Indian country within their borders." Cohen at 537 (footnotes omitted).[43] It "offered any other state the option of accepting the same jurisdiction," until a 1968 amendment "made subsequent assumptions of jurisdiction subject to Indian consent." *Id.* at 537–38; *see* 25 U.S.C. §§ 1321(a), 1322(a), 1326.

Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6. But "[t]he State's 1953 position that Public Law 280 was unnecessary for Oklahoma . . . [has] been rejected by both federal and state courts." *Id.* (citing Tenth Circuit and Oklahoma cases). Oklahoma has not obtained tribal consent following the 1968 amendment and has thus never acquired jurisdiction over Indian country through Public Law 280. *See Cravatt*, 825 P.2d at 279 ("The State of Oklahoma has never acted pursuant to Public Law 83–280." (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989))); *see also* Cohen at 537–38 & n.47.

The termination era began to fade in the late 1950s as federal Indian policy shifted again toward tribal

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[43] The six states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See id.* at 537 nn.44–45.

self-government and self-determination. *See* Cohen at 93.

j. A new Creek Constitution

In 1979, under OIWA, the Creek Nation adopted a new constitution "providing for three separate branches of government, including a judiciary." *Muscogee (Creek) Nation*, 851 F.2d at 1442. In 1982, when the tribe sought funding from the Bureau of Indian Affairs ("BIA") for its court system, the D.C. Circuit confronted the question whether the Creek Nation could operate a court system at all in light of Congress's earlier abolition of the tribal courts. The D.C. Circuit held that OIWA had repealed the earlier elimination of Creek courts. *Id.* at 1444–46. "[T]he Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes generally applicable to all tribes." *Id.* at 1446–47 (emphases omitted).

k. Our decision in *Indian Country, U.S.A.*

In 1987, we held in *Indian Country, U.S.A.*, that the Creek Reservation continues to exist, at least in some form. The case arose when Oklahoma tried to tax a bingo operation located on Creek Nation land that had never been allotted and was still held by the Tribe. 829 F.2d at 970. Oklahoma argued the site was not a reservation and therefore subject to the State's taxation. *Id.* at 973. We rejected that argument and explained the site at issue was "part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)." *Id.* at 976. Accordingly, we invalidated the

Oklahoma tax. *Id.* at 987. Our holding, however, was limited. Because the case concerned land that had never been allotted and was still held by the Tribe, we had—as we twice made clear—no cause to decide whether Congress had disestablished the Reservation's 1866 exterior boundaries. *Id.* at 975 n.3, 980 n.5. We now confront that question.

3. Applying *Solem*

We must apply the *Solem* framework to determine whether Congress has disestablished the Creek Reservation. If the Reservation's boundaries are still intact, the crime occurred within them. *See* Aplt. Br. at 20; Aplee. Br. at 11–12. The State argues, however, that Congress disestablished the Creek Reservation in the early twentieth century. Mr. Murphy and the Creek Nation disagree.

We conclude Congress has not disestablished the Creek Reservation. The most important evidence—the statutory text—fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of "*unequivocally* reveal[ing]" a congressional intent to disestablish. *Parker*, 136 S. Ct. at 1080 (emphasis in original) (quoting *Solem*, 465 U.S. at 471). Because our application of the *Solem* framework shows Congress has not disestablished the Creek Reservation, the crime in this case occurred within the Reservation's boundaries. The State of Oklahoma accordingly lacked jurisdiction to prosecute Mr. Murphy.

a. Step One: Statutory Text

The State argues the Creek Reservation did not survive a series of statutes that allotted Creek lands

and created the State of Oklahoma. The State "acknowledges that no relevant act of Congress contains language which expressly disestablished the Creek Nation reservation through the use of such words as 'cede' or 'relinquish.'" Aplee. Br. at 57. It attempts to show disestablishment based on the collective weight of eight different laws enacted between 1893 and 1906.

At oral argument, we asked whether the State was relying on any particular statutory language in any of these laws for its step-one argument:

> THE COURT: Where do you find your strongest statutory language that the Creek Reservation was diminished or disestablished?
>
> THE STATE: You have to start before the 1901 Allotment Act. . . . In 1893, Congress passed the law which set up the Dawes Commission.
>
> THE COURT: I asked for statutory language, not a general overview of a statute. Where in any of these acts is there language that disestablished the Reservation?
>
> THE STATE: In that 1893 Act, Congress said that they were appointing the Dawes Commission to negotiate with the Tribes in whatever means necessary in order to create a State embracing the Indian Territory and to substitute for the tribal governments a State government.
>
> THE COURT: But that didn't happen.
>
> THE STATE: The—well, I think that's what we're arguing about here today.
>
> THE COURT: Well, let's go to 1901. . . . .

THE COURT: Where's the disestablishment in the Act? You haven't given us in your brief or anything you said today any language from any act that shows disestablishment. And isn't that the first *Solem* factor?

THE STATE: Well, yes, Your Honor, but [Congress does not] have to use the words . . . .

THE COURT: Well, okay, even if they don't use the words. Can you give us some examples?

THE STATE: Of course—

THE COURT: Counsel, on the same point, I think . . . what we're looking for is what has been given in other Supreme Court cases where they have seized on language whether it's 'public domain' or whether it's the word 'cede' or whether it's a lump-sum payment. Those—there are words in a sentence in those acts, and what we're asking is can you show us words in a sentence in the acts that you're talking about that are equal or equivalent of those words rather than a general summary sort of an answer? We're looking for specific language.

THE STATE: Other than the entire context of what happened, I cannot. . . . I still argue that the acts themselves are sufficient, but, if not, under *Osage Nation*, when you look at the step-two evidence here, it's overwhelming.

THE COURT: Well, so your answer is that you don't have any language?

THE STATE: I do not have a specific section that I can look at and say this is—

> THE COURT: And so the argument that I just heard is that it's context. Your word.
>
> THE STATE: Correct. If you look at all of the acts together, which the Supreme Court has said you can do—no I can't—when you look at the specific language which provides for the allotment, it doesn't use words [like] 'cession,' it doesn't provide for a fixed sum, those sorts of things that have happened in other cases. But when you go all the way back to when Congress started passing acts that led up to the 1901 Act, it's very clear that their purpose was to substitute for the tribal government a State government and put the area of the Five Tribes under State law.

Oral Arg. at 50:23–54:07. This exchange aligns with the position taken in the State's brief. *See* Aplee. Br. at 57. At step one, the State does not rely on any particular statutory text but rather on all eight acts in general because it does not "have a specific section" in any law that accomplished disestablishment. Oral Arg. at 53:18–21.

We question whether the State's argument based on the overall thrust of eight different laws deserves to be called a step-one argument. At step one, "we start with the *statutory text*." *Parker*, 136 S. Ct. at 1079 (emphasis added); *see also Solem*, 465 U.S. at 470 ("The most probative evidence of congressional intent is the statutory *language* used to open the Indian lands." (emphasis added)); *Wyoming*, 849 F.3d at 869 ("*First*, we look to the text of the statute . . . ."). The State does not present us with any particular statutory language to analyze. Our independent review of the laws has not uncovered a provision on which the State might rely, either.

Assuming the State's cumulative-effect argument belongs in step one where we consider text, as opposed to step two where we consider context, we proceed to (i) review each of the eight statutes the State relies on, paying particular attention to the 1901 Original Allotment Agreement, and then (ii) conduct our step-one analysis based on those laws. The absence of statutory language in any of these acts disestablishing the Creek Reservation leads us to conclude the State "ha[s] failed at the first and most important step." *Parker*, 136 S. Ct. at 1080. In fact, the step-one evidence shows Congress recognized the existence of the Creek Nation's borders. And the State's attempts to shift the inquiry into questions of title and governance are unavailing.

i. The statutes

We discuss the State's eight statutes in chronological order.

1) Act of March 3, 1893, ch. 209, 27 Stat. 612 ("1893 Act")

The State first draws our attention to an appropriations law providing money for the federal government to fulfill treaty obligations with Indian tribes throughout the country. With respect to the Creek Nation, the 1893 Act provided funding for treaties from 1790 to 1866 to pay for, among other things, annuities, blacksmithing, iron, steel, and interest on other funds. *See* 27 Stat. at 616–17.

In addition to providing funds, Congress gave "the consent of the United States" to the allotment of lands "within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and

[S]eminoles." § 15, 27 Stat. at 645.[44] Congress instructed the President to appoint a commission, which became known as the Dawes Commission, to negotiate with the Creek Nation and the other tribes

> for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such and adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory.

§ 16, 27 Stat. at 645. Congress provided the negotiators' priorities should be "first" to procure an allotment of lands "as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of

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[44] The law provided that tribal members who accepted an allotment would be deemed U.S. citizens. § 15, 27 Stat. at 645. The Supreme Court has explained that "the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them." *United States v. John*, 437 U.S. 634, 653–54 (1978). "Nor has [U.S.] citizenship prevented the Congress . . . from continuing to deal with the tribal lands of the Indians." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 312 (1911). *See generally* Cohen at 922–24 (discussing citizenship).

land for his or her needs." § 16, 27 Stat. at 646. "[S]econdly," the negotiators were to "procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States." *Id.* Although Congress wanted to pursue both allotment and the sale of surplus lands to the United States, it granted the commissioners

> power to negotiate any and all such agreements as . . . shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state in the Union.

Id. The 1893 Act established the Dawes Commission to commence negotiations; it did not disestablish the Creek Reservation.

2) Act of June 10, 1896, ch. 398, 29 Stat. 321 ("1896 Act")

The State next relies on an 1896 appropriations law in which Congress again provided money to fulfill treaty obligations with the Creek Nation. 29 Stat. 326–27. The 1896 Act declared it "the duty of the United States to establish a government in the Indian Territory" for the purpose of "rectify[ing] the many inequalities and discriminations" in the Territory and "afford[ing] needful protection to the lives and property of all citizens and residents thereof." 29 Stat. at 340. The Dawes Commission was directed "to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them." 29 Stat. at 339. Nothing in this law altered the Reservation's boundaries.

3) Act of June 7, 1897, ch. 3, 30 Stat. 62 ("1897 Act")

The State's third statute is an 1897 appropriations statute in which Congress again approved funds to satisfy obligations arising from treaties with the Creek Nation. *See* 30 Stat. at 68. Congress also provided that, beginning in 1898, the United States courts would have "original and exclusive jurisdiction" over both civil and criminal cases in the Indian Territory. 30 Stat. at 83. The laws of the United States and of neighboring Arkansas, which were already in force in the Indian Territory, would apply "to all persons therein, irrespective of race." *Id.* In addition, Congress legislated that, beginning in 1898, "all acts, ordinances, and resolutions" of the legislative bodies of the Five Civilized Tribes would be subject to presidential veto. 30 Stat. at 84. This provision did not apply to tribal legislation related to negotiations with the Dawes Commission. *Id.* The law also provided that if any of the Tribes reached a negotiated agreement with the Dawes Commission, that new agreement, once ratified, would "suspend" any provisions of the 1897 Act inconsistent with the agreement. *Id.* In sum, this statute altered federal and tribal governance arrangements in the Indian Territory, but it did not erase the Creek Reservation's borders.

4) "Curtis Act," ch. 517, 30 Stat. 495 (June 28, 1898)

In 1898, Congress imposed new limitations on the powers of tribal governments in the Indian Territory. Under the Curtis Act, tribal courts would be abolished within the year. § 28, 30 Stat. at 504–05. All cases would be transferred to the United States court in the Indian Territory, and tribal laws would be unenforceable. §§ 26, 28, 30 Stat. at 504–05. Congress instructed

the Secretary of the Interior ("Secretary") to stop directing federal payments to tribal governments and to begin paying individual tribal members directly. § 19, 30 Stat. at 502. The Curtis Act included a default allotment scheme that would take effect following completion of the tribal citizenship rolls and survey of tribal lands. § 11, 30 Stat. at 497–98.[45] But, as discussed in the next section, Congress and the Creek Nation later agreed to a different allotment plan. The Curtis Act made the most significant governance changes to date, but it did not address the Creek Reservation's borders.

5) "Original Allotment Agreement," ch. 676, 31 Stat. 861 (March 1, 1901)

The Creek Nation reached a negotiated agreement with the federal government for the allotment of tribal lands, and Congress passed it into law in 1901. The Original Agreement, supplemented by another agreement we discuss below, specified that its terms would control over conflicting federal statutes and treaty provisions, but it "in no wise affect[ed]" treaty provisions consistent with the Agreement. ¶¶ 41, 44, 31 Stat. at 872. Our discussion of the Original Agreement covers (a) the allotment of Creek lands, (b) provisions concerning town sites, (c) lands reserved for tribal purposes, and (d) the Agreement's plan for future governance within the borders of the Creek Reservation.

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[45] The Curtis Act also contained a proposed agreement between the federal government and the Creek Nation providing for the allotment of tribal lands, *see* § 30, 30 Stat. at 514–19, but the Creek Nation did not ratify the agreement. A different allotment agreement was reached in 1901, and we discuss it in the next section.

a) Allotment

The Agreement's central purpose was to facilitate a transfer of title from the Creek Nation generally to its members individually. It provided that "[a]ll lands belonging to the Creek tribe," except for town sites and lands reserved for public purposes, should be appraised and allotted "among the citizens of the tribe." ¶¶ 2–3, 31 Stat. at 862–63.[46] Tribal citizenship rolls determined an individual's eligibility for an allotment. ¶¶ 3, 28, 31 Stat. at 862–63, 869–70.[47] The United States would bear the costs of "the survey, platting, and disposition" of lots, except where town authorities undertook those efforts. ¶ 34, 31 Stat. at 871.

Creek citizens would receive an allotment of 160 acres valued at $6.50 per acre. ¶ 3, 31 Stat. at 862. Recognizing that the tracts would not have the same value, the Act provided that "the residue of lands" not otherwise allotted or reserved—the surplus lands—would be used "for the purpose of equalizing allotments." ¶ 9, 31 Stat. at 864. Creek citizens with more valuable lots could have the excess value charged against their entitlement to other tribal funds. ¶ 3, 31 Stat. at 862–63. The Tribe's funds from earlier treaties were made available to equalize allotments. ¶ 27, 31 Stat. at 869.

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[46] The Agreement defined "citizen" as "a member . . . of the Muskogee tribe or nation of Indians." ¶ 1, 31 Stat. at 862. The Act stipulated "the words 'Creek' and 'Muskogee'" were synonymous. *Id.*

[47] The Agreement provided citizens of the Seminole Nation who had settled in lands belonging to the Creeks were allowed to take allotments in Creek lands, and the same terms were extended to Creek citizens in Seminole lands. ¶ 36, 31 Stat. at 871.

The assignment of allotments was not random. Creek citizens who had built improvements or possessed particular lands could select those lands. *See* ¶¶ 3, 5–6, 31 Stat. at 862–63.[48] The Agreement provided for dispute resolution when Creek citizens contested their right to select certain tracts. ¶ 6, 31 Stat. at 863.

The Tribe's principal chief was assigned the task of transferring title from the Tribe to the individual allottees. ¶ 23, 31 Stat. at 867–68. Each deed conveyed to the allottee "all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in [the] allotment certificate." ¶ 23, 31 Stat. at 868. For the allottee, acceptance of the deed represented "assent to the allotment and conveyance of all the lands of the tribe" and a "relinquishment of all his right, title, and interest in" the rest of the allotted lands as provided in the Agreement. *Id.*

The Secretary of the Interior was supposed to approve the conveyances, and this approval would serve "as a relinquishment" to the Creek citizen "of all the right, title, and interest of the United States in and to the lands embraced in [the] deed." *Id.*[49] But the Agreement provided for various forms of continuing

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[48] For members of the Creek Nation unable to select lands for themselves—children, "prisoners, convicts, and aged and infirm persons"—the Agreement provided a mechanism for selection on their behalf and in "the best interests of such parties." ¶ 4, 31 Stat. at 863; *see also* ¶¶ 7, 23, 31 Stat. at 863–64, 867–68.

[49] The United States was understood to have a reversionary interest in the Tribe's lands. *See* 1833 Treaty, art. 3, 7 Stat. at 419 (providing the Creek Nation's fee simple interest would continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them"); § 15, 27 Stat. at 645 (consenting that "upon the allotment of the lands held by [the Five Civilized Tribes] the reversionary interest of the United States therein shall be relinquished and shall cease").

federal supervision. For example, it restricted the ability of allottees to encumber or alienate their lands without approval from the Secretary. ¶ 7, 31 Stat. at 863–64. A five-year restriction period applied to allotted lands generally, but a 21-year restriction applied to a subset of an allottee's lands—the 40 acres selected as a homestead. *Id.* Creek citizens were allowed to rent their allotments, subject to restrictions. ¶ 37, 31 Stat. at 871.

b) Town sites

The Agreement excluded "town sites" from allotment. ¶¶ 2, 24(a), 31 Stat. at 862, 868. Towns "in the Creek Nation" with more than 200 people would be "surveyed, laid out, and appraised." ¶ 10, 31 Stat. at 864. Town commissions, which were to include Creek commissioners, would administer the sale of town lots "for the benefit of the tribe." ¶ 10, 31 Stat. at 865. "Any person," not just Creek citizens, "in rightful possession of any town lot having improvements thereon" was given the opportunity to purchase the lot. ¶ 11, 31 Stat. at 866; *see also* ¶¶ 12–13, 31 Stat. at 866 (providing similar purchase opportunities to people with residential or business holdings in towns). Town sites lacking improvements would be sold at public auction within 12 months of their appraisal. ¶ 14, 31 Stat. at 866. Once sold, town lots were subject to municipal taxation. ¶ 17, 31 Stat. at 867.[50]

Some town sites were not available for purchase. The Agreement instructed town surveyors to set aside lands for cemeteries, ¶ 18, 31 Stat. at 870, and lots where church houses had been erected were conveyed

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[50] The Agreement gave municipal corporations authority to issue bonds and borrow money for public projects such as for "the construction of sewers, lighting plants, waterworks, and schoolhouses." ¶ 25, 31 Stat. at 869.

to the churches at no cost, ¶ 21, 31 Stat. at 867. Educational institutions in Muskogee and other towns "in the Creek Nation" were given the chance to purchase lands at a discount. ¶ 20, 31 Stat. at 867. The United States reserved a right to "purchase, in any town in the Creek Nation, suitable land for courthouses, jails, and other necessary public buildings for its use, by paying the appraised value thereof." ¶ 19, 31 Stat. at 867.

c) Lands reserved for tribal purposes

In addition to town sites, the Agreement provided certain other lands would be "reserved from the general allotment" scheme. ¶ 24, 31 Stat at 868. Most of the reserved lands were for tribal purposes: Creek schools and orphan homes, ¶ 24(c)–(*l*), 31 Stat. at 868; cemeteries, ¶ 24(m), 31 Stat. at 868; a university, ¶ 24(n), 31 Stat. at 868–69; Creek courthouses, ¶ 24(o), 31 Stat. at 869; and churches and schools outside of towns, ¶ 24(p), 31 Stat. at 869. If and when these lands were no longer "needed for the purposes for which they are at present used," the Agreement provided they should be sold at auction "to citizens only." ¶ 24, 31 Stat. at 869.

d) Future governance

The Agreement contemplated roles for both the Tribe and the federal government in the post-allotment governance of the Creek Nation. It recognized Creek jurisdiction as continuing but also limited and temporary. It also provided for ongoing federal regulation and defined federal responsibilities by reference to the Creek Nation's borders.

A continuing role for the tribal government was apparent in a provision recognizing Creek legislative authority over both unallotted tribal lands and allotted lands. ¶ 42, 31 Stat. at 872. "[A]ct[s], ordinance[s],

[and] resolution[s]" of the Creek National Council remained subject to presidential approval, but the Agreement recognized the Creek government's authority to regulate "the lands of the tribe" as well as lands belonging to "individuals after allotment." *Id.*; *see also id.* (providing for Creek regulation, with presidential oversight, of "the moneys or other property of the tribe, or of the citizens thereof"). The Agreement also provided that Creek law would determine issues of descent and distribution. ¶¶ 7, 28, 31 Stat. at 864, 870.[51]

Under the Agreement, the Tribe continued to exercise authority over its finances: "No funds belonging to said tribe shall hereinafter be used or paid out for any purposes by any officer of the United States without consent of the tribe, expressly given through its national council, except as herein provided." ¶ 33, 31 Stat. at 870; *see also* ¶ 31, 31 Stat. at 870 (requiring that the federal government provide monthly, itemized financial reports to the principal chief regarding the Tribe's funds in the U.S. Treasury). The Agreement assigned the Creek National Council responsibility for appropriating money to operate tribal schools. ¶ 40, 31 Stat. at 872. It also authorized lawsuits "in the name of the principal chief, for the benefit of the tribe" to enforce liens against the property of people who defaulted on their purchase of property in towns. ¶ 30, 31 Stat. at 870.

Despite these recognitions of continuing Creek governmental authority, the Agreement contemplated this authority would be temporary. It said the tribal government would not continue past March 4, 1906, "subject to such further legislation as Congress may

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[51] Creek courts, already abolished under the Curtis Act, were not reestablished. ¶ 47, 31 Stat. at 873.

deem proper." ¶ 46, 31 Stat. at 872. In other words, the Agreement set a date for the dissolution of the tribal government while recognizing a later Congress could change course. Congress did change course, and dissolution never happened.

In addition to providing a limited role for tribal government, the Agreement assigned powers and responsibilities to the United States, many of which were expressly tied to the Creek Nation's territorial boundaries. For example, the Secretary was authorized to collect a grazing tax when cattle were brought "into the Creek Nation" and grazed on unallotted lands. ¶ 37, 31 Stat. at 871. Revenue from the tax was "for the benefit of the tribe." *Id.* Similarly, although Creek citizens could dispose of timber on their allotments, no timber could be taken from unallotted lands "without payment of [a] reasonable royalty" and under conditions prescribed by the Secretary. ¶ 38, 31 Stat. at 871. The mineral-leasing provisions from the Curtis Act were not to apply "in the Creek Nation." ¶ 41, 31 Stat. at 872. And the United States agreed to maintain strict laws against the introduction of liquor "in said nation." ¶ 43, 31 Stat. at 872.[52]

To summarize, the Original Agreement shifted communal Creek land into individual allotments and provided for dissolution of the tribal government in the future. It also reserved from allotment lands for tribal

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[52] The task of removing "objectionable" persons from the lands of Creek citizens fell to the Secretary of the Interior and the United States Indian agent. ¶ 8, 31 Stat. at 864.

The Secretary was also to administer the Creek school fund, and Creek schools were to be governed under the Secretary's rules and regulations as well as "under Creek laws" subject to the Secretary's oversight. ¶ 40, 31 Stat. at 871–72. The Agreement included a hiring preference for Creek citizens in teaching positions. ¶ 40, 31 Stat. at 872.

purposes and repeatedly recognized the continuing existence of the Creek Nation's borders.

6) "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (June 30, 1902)

The 1902 Supplemental Allotment Agreement clarified the Original Agreement and made several amendments. Allotment-eligible lands would be appraised at no more than $6.50 per acre, not including improvements. ¶ 2, 32 Stat. at 500. The Dawes Commission was assigned exclusive jurisdiction to resolve the disputes of Creek citizens over the selection of particular allotments. ¶ 4, 32 Stat. at 501.[83] The Supplemental Agreement made corrections to the Creek Nation's citizenship rolls and addressed the situation of citizens entitled to an allotment who died before receiving it. ¶¶ 7–9, 32 Stat. at 501–02.

The Supplemental Agreement provided that Arkansas law, not Creek law, would govern inheritance but said "only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation." ¶ 6, 32 Stat. at 501. Noncitizen heirs could inherit when there was no Creek descendent. *Id.*

Anti-encumbrance and alienation provisions were reaffirmed and set to run from the date of the Supplemental Agreement. ¶ 16, 32 Stat. at 503. Restrictions on leases were also clarified. *See* ¶ 17, 32 Stat. at 504 (addressing leases for mineral extraction (prohibited), grazing (limited to one year), and agricultural purposes (limited to five years)). Other parts of the Supplemental Agreement addressed public resources. *See* ¶ 13, 32 Stat. at 503 (providing for the purchase of land for parks within towns); ¶ 15, 32 Stat. at 503 (subjecting Creek courthouse lands to allotment); ¶ 18,

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[83] *See also* ¶ 5, 32 Stat. at 501 (providing for corrections when selected land did not include allottee's home)

32 Stat. at 504 (regulating introduction of cattle "into the Creek Nation").

The Supplemental Agreement left in place the planned dissolution of the tribal government. It required the Secretary, following dissolution of the tribal government, to pay the Tribe's remaining funds to the citizens of the Creek Nation. ¶ 14, 32 Stat. at 503; *see also* ¶ 19, 32 Stat. at 504 (requiring the Secretary "during the continuance of the tribal government" to defend allottees against claims on their land arising from illegal leases and conveyances).

Overall, the Supplemental Agreement continued the policies embodied in the Original Agreement. It did not address the Creek Reservation's borders except to recognize their existence.

7) "Five Tribes Act," ch. 1876, 34 Stat. 137, April 26, 1906[54]

The State relies on two more statutes, both from 1906.[55] The first is the Five Tribes Act, in which Congress recognized and extended the Creek government's existence while also imposing new limitations

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[54] The Five Tribes Act was passed after March 4, 1906, the date the Original Agreement had set for the dissolution of the Creek government, *see* ¶ 47, 31 Stat. at 872, but Congress extended the Creek government's existence before the deadline on March 2, 1906, *see* 34 Stat. 822. As this section discusses, the Five Tribes Act extended the Creek government again, this time indefinitely.

[55] The State contends these laws "carry less weight" because they were passed after the allotment agreements. Aplee. Br. at 62. This suggests the State considers the 1901–02 allotment agreements to be the legislative enactments in which Congress disestablished the Creek Reservation, yet the State includes the 1906 statutes in its step-one argument. We consider the text of the 1906 laws as step-one evidence, as opposed to step-three, later-history evidence, because statutory text is the concern of step one. *See Parker*, 136 S. Ct. at 1079 ("[W]e start with the statutory text . . . .").

on its authority. It provided the Creek Nation's "tribal existence and present tribal government[]" would "continue[] in full force and effect for all purposes authorized by law, until otherwise provided by law." § 28, 34 Stat. at 148. It continued presidential oversight of tribal legislation, and further restricted tribal legislative functions by limiting tribal governments to 30-day legislative sessions each year. *Id.*

The Five Tribes Act gave new authority to the President and Secretary of the Interior. The President received authority to appoint a tribal citizen as principal chief when the principal chief died, became disabled, or refused or neglected to perform his duties. § 6, 34 Stat. at 139. The Secretary received power to approve land conveyances if the principal chief failed to act. *Id.* The Act also authorized the Secretary to "assume control and direction" of the Tribes' schools in 1906 with the goal of retaining "tribal educational officers" and "the present system so far as practicable" until a "public school system" was established under a future territorial or state government. § 10, 34 Stat. at 140–41. The Secretary received authorization to bring suit in the United States courts in the Indian Territory for the recovery of money or lands claimed by the Creek Nation. § 18, 34 Stat. at 144.[56]

The Five Tribes Act continued many of the restrictions on allotted lands and amended others. Congress continued the Original Agreement's provisions for the equalization of Creek allotments. § 2, 34 Stat. at 137–38. It also clarified that lands reserved for public purposes would "revert to the tribe and be disposed of

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[56] Congress also assigned new powers at the town level. It provided for the operation of light and power companies within the Indian Territory and granted new taxing powers to towns with more than two thousand people. *See* §§ 25–26, 34 Stat. at 146–48.

as other surplus lands" when the land was no longer used for the public purpose for which it was reserved. § 14, 34 Stat. at 142. The Secretary was instructed to sell unallotted lands not otherwise provided for and deposit the proceeds into the Treasury for the Tribe's benefit. § 16, 34 Stat. at 143.[57] New 25-year restriction periods against alienation and encumbrance were imposed on allotted lands, but allotted lands were immune from taxation "as long as the title remain[ed] in the original allottee." § 19, 34 Stat. at 144. Allottees remained free to lease their lands, subject to restrictions. §§ 19–20, 34 Stat. at 144–45.[58]

The Five Tribes Act provided for the future distribution of tribal property to Creek citizens. It abolished tribal taxes and instructed the Secretary to wind up claims against the Tribe following the dissolution of the tribal government. § 11, 34 Stat. at 141. Tribal citizenship rolls would be finalized by March 4, 1907. §§ 1, 2, 34 Stat. at 137–38. The Secretary would eventually take possession of and sell tribal buildings, furniture, and lands. § 15, 34 Stat. at 143. Local governments—be they state, territorial, county, or municipal—received the first chance to buy; proceeds would be deposited in the Treasury for the benefit of

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[57] Purchasers of town lots who failed to make timely payments were liable to forfeit the purchase and have the Secretary re-sell the land at public auction. § 12, 34 Stat. at 141–42.

[58] Congress made several changes to the laws of descent and inheritance. For allottees who died intestate and without heirs, their lands would revert to the Tribe or escheat to the future state or territorial government. § 21, 34 Stat. at 145. Adult Indian heirs were permitted to sell the lands they inherited, subject to the Secretary's approval. § 22, 34 Stat. at 145. Adult Indians were permitted to make wills, subject to court oversight when the will disinherited certain closely related family members. § 23, 34 Stat. at 145.

the Tribe. *Id.*[59] As had been the case in earlier acts, the Secretary was required to distribute the proceeds from the sale of tribal property to the Tribe's members on a per capita basis. § 17, 34 Stat. at 143–44.

In a section labeled "Tribal lands to be held in trust," the Act provided that, upon dissolution of the Five Tribes, tribal lands "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit" of the Tribes' members and their heirs. § 27, 34 Stat. at 148. And, as mentioned above, the Act extended the tribal governments' existence without setting a date for dissolution, providing only that they would continue "until otherwise provided by law." § 28, 34 Stat. at 148. The Five Tribes Act thus recognized that the Creek Nation's government continued to exist in "full force and effect," and that, in the event of the future dissolution of the tribal government, "the land[] belonging to the . . . Creek [Nation]" would be held in trust by the United States for the Tribe. *Id.* It did not terminate the Reservation's borders.

8) "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267 (June 16, 1906)

In the Oklahoma Enabling Act, the final statute the State relies on, Congress did not dissolve the Creek government, but it granted permission to the inhabitants of both the Territory of Oklahoma and the Indian Territory to adopt a constitution and seek admittance into the Union as the State of Oklahoma. § 1, 34 Stat. at 267–68. Congress imposed restrictions on the new

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[59] Later in 1906, Congress delayed the implementation of § 15—providing for the sale of tribal property—and clarified it would "not take effect until the date of the dissolution of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes." Act of June 21, 1906, ch. 3504, 35 Stat. 325, 342.

state's ability to affect Indians and Indian property. "[N]othing" in the state constitution was

> to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise . . . .

Id. Further, Congress required the people of the territories to

> forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

§ 3, 34 Stat. at 270. Congress also prohibited the new state from allowing the liquor trade for 21 years within the Indian Territory, the bordering Osage Reservation, and "any other part of said State which existed as Indian reservations" as of 1906. § 3, 34 Stat. at 269.

Oklahoma was awarded five seats in the House of Representatives. § 6, 34 Stat. at 271–72. Congress instructed that the third district must "comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State." *Id.*

The United States granted Oklahoma certain townships for the State's school system but withheld "any lands embraced in Indian, military, or other reservations of any character" and specified that "land owned by Indian tribes or individual members of any tribe" were excluded "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." § 7, 34 Stat. at 272.

Upon Oklahoma's admission as a State, the territorial laws in force within the Territory of Oklahoma would take effect statewide, and all applicable federal laws would take effect as they applied elsewhere in the country. § 21, 34 Stat. at 277–78.

The Oklahoma Enabling Act, as this court has already said, does not "contain express termination language." *Osage Nation*, 597 F.3d at 1124.

* * * *

The foregoing statutes show the Creek Nation accepted an allotment scheme that retained "surplus" lands for tribal citizens, and Congress established the State of Oklahoma. We now consider further whether, as the State insists, these laws also disestablished the Creek Reservation.

ii. Analysis

None of these statutes disestablished the Creek Reservation. The State's case for termination of the Creek Reservation thus falters at "the first and most important step." *Parker*, 136 S. Ct. at 1080. The State argues the cumulative effect of the eight laws demonstrate that Congress disestablished the Creek Reservation. For three reasons, we disagree. First, the statutes lack any of the textual "hallmarks" demonstrating congressional intent to disestablish, and no other language shows Congress altered the Creek

Reservation's boundaries. *See id.* at 1079. Second, specific statutory language—"[t]he most probative evidence of congressional intent," *Solem*, 465 U.S. at 470—shows Congress continued to recognize the Reservation's borders. Third, the State's reliance on the statutes' reforms of title and governance arrangements within the Reservation is unavailing because these changes did not disestablish the Reservation.

1) No hallmarks of disestablishment or diminishment

Congress never expressly terminated the Creek Reservation in any of the statutes, nor did it use the kind of language recognized by the Supreme Court as evidencing disestablishment. It has long been clear "the Congresses that passed the surplus land acts" were hostile to the reservation system; indeed they "anticipated [its] imminent demise" and "passed the acts partially to facilitate the process," but *Solem* prevents courts from "extrapolat[ing]" this general congressional expectation into "a specific congressional purpose" with respect to a given reservation. 465 U.S. at 468–69; *see also Shawnee Tribe*, 423 F.3d at 1220 & n.18 (explaining that, notwithstanding the "Congressional desire to end the reservation system," the question of "[w]hether a particular treaty or Congressional act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis"). "The effect of any given surplus land act depends on *the language* of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469 (emphasis added). Here at step one, we consider the language and find no congressional purpose to disestablish the Creek Reservation's borders.

We have not identified termination language in any of the statutes the State cites. Indeed, the State concedes that not one of the eight statutes contains particular language that disestablished the Creek Reservation.

The absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a reservation, as the following examples illustrate:

- "[T]he Smith River reservation is hereby discontinued." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221; *see Mattz*, 412 U.S. at 504 n.22 (citing statute as an example of "clear language of express termination").
- "That subject to . . . allotment . . . a [legislatively defined] portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain . . . ." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62–63; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of "clear language of express termination"); *Seymour*, 368 U.S. at 354 (discussing as example of diminishment language).
- "Subject to the allotment of land . . . and for the considerations hereinafter mentioned . . . [the] Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in

the Indian Territory . . . ." Act of June 6, 1900, ch. 813, art. 1, 31 Stat. 672, 676–77; *see Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950) (discussing statute as example of language "disestablish[ing] the organized reservation").

- "[A]ll the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263; *see Hagen*, 510 U.S. at 412 (discussing statute and explaining that "Congress considered Indian reservations as separate from the public domain").
- "[T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, ch. 1409, 33 Stat. 189, 218; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of "clear language of express termination").
- "The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following lines . . . ." Act of March 3, 1905, ch. 1452, art. 1, 33 Stat. 1016, 1016; *see Wyoming*, 849 F.3d at 870 (calling this language "precisely suited to diminishment" (quotations omitted)).[60]

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[60] Additional examples can even be found within the statutes the State cites, but not with respect to the Creek Nation. In the

Indeed, Congress has had no difficulty addressing the boundaries of the Creek Reservation, and, as the following treaties show, Congress used clear language on these occasions:

- "The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia, and lying on the east side of the middle of the Chatahoochie river. And, also, another tract of land lying within the said State, and bounded as follows . . . ." 1826 Treaty, art. 2, 7 Stat. at 286–87.
- "The Creek tribe of Indians cede to the United States all their land, East of the Mississippi river." 1832 Treaty, art. 1, 7 Stat. at 366.
- "The United States hereby agree . . . that the Muskogee or Creek country west of the Mississippi, shall be embraced within the following boundaries . . . ." 1833 Treaty, art. 2, 7 Stat. at 418.

1893 appropriations law—the State's first statute—Congress provided money to satisfy sum-certain purchases of Indian lands under agreements previously negotiated with two Tribes. First, Congress approved $30,600 "to pay the Tonkawa tribe of Indians in the Territory of Oklahoma for all their right, title, claim, and interest of every kind and character in and to four townships of land . . . conveyed and relinquished to the United States." § 11, 27 Stat. at 643–44. Second, Congress appropriated $80,000 "to pay the Pawnee tribe of Indians in Oklahoma, formerly a part of the Indian Territory, for all their right, title, claim, and interest of every kind and character in and to all that tract of country between the Cimarron and Arkansas rivers embraced within the limits of seventeen specified Townships of land, ceded, conveyed, and relinquished to the United States." § 12, 27 Stat. at 644. Further, Congress declared these newly acquired lands to be "part of the public domain." § 13, 27 Stat. at 644.

- "The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries . . . ." 1856 Treaty, art. 1, 11 Stat. at 699; *see also id.* at art. 2, 11 Stat. at 700 ("The following shall constitute and remain the boundaries of the Creek country . . . ."); *id.* at arts. 5–6, 11 Stat. at 700–02 (providing for release of Creek claims to specified lands in consideration of $1 million paid by United States).
- "[T]he Creeks hereby cede and convey to the United States . . . the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands . . . the United States agree to pay the sum of . . . nine hundred and seventy-five thousand one hundred and sixty-eight dollars . . . ." 1866 Treaty, art. 3, 14 Stat. at 786; *see also id.* at art. 9, 14 Stat. at 788 (providing for the construction of buildings "in the reduced Creek reservation").

The Supreme Court has said that when earlier treaties contained unequivocal language of disestablishment or diminishment and a later enactment "speaks in much different terms," "[t]he change in language . . . undermines [the] claim that Congress intended to do the same with the reservation's boundaries in [the later statute] as it did in [the earlier treaties]." *Parker*, 136 S. Ct. at 1080; *see also Mattz*, 412 U.S. at 504

("Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the [relevant statute]. This being so, we are not inclined to infer an intent to terminate the reservation."); *Seymour*, 368 U.S. at 355 (comparing earlier statute "expressly vacating the South Half of the reservation and restoring that land to the public domain" with later statute and finding that later statute "repeatedly refer[red] to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such").

Although the State contends the cumulative force of the eight statutes disestablished the Creek Reservation, Congress again discussed Creek boundaries in direct terms immediately following passage of the State's final statute. The Oklahoma Enabling Act was passed on June 16, 1906. 34 Stat. at 267. Days later, on June 21, Congress recommitted to the boundary separating "the Creek Nation" and "the Territory of Oklahoma." Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364. The line, surveyed in 1871 and reestablished by the U.S. Geological Survey in 1895 and 1896, was "declared to be the west boundary line of the Creek Nation." *Id.* In the same statute, Congress established a new recording district in the Indian Territory and did so by reference to "the north line of the Creek Nation." 34 Stat. at 343. These references to the lines and boundaries of the Creek Nation undercut the State's contention that its eight statutes cumulatively disestablished the Creek Reservation.

As we recently said in *Wyoming*, "[t]here are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must 'establish an express congressional purpose to diminish.'" 849 F.3d at 869–70 (quoting *Hagan*, 510

U.S. at 411). There are no traditional textual signs of disestablishment in any of the statutes, and our review uncovers no other language to overcome the presumption that the Creek Reservation continues to exist. *See Solem*, 465 U.S. at 481. In fact, the Original Agreement recognized the Reservation's boundaries.

2) Signs Congress continued to recognize the Reservation

The eight statutes not only lack textual evidence that Congress disestablished the Creek Reservation, the Original Agreement contains language recognizing the existence of the Creek Nation's borders. *See, e.g.*, ¶ 10, 31 Stat. at 864 (discussing towns "in the Creek Nation"); ¶ 25, 31 Stat. at 869 (municipal corporations "in the Creek Nation"); ¶ 37, 31 Stat. at 871 (introduction of cattle "into the Creek Nation"); ¶ 41, 31 Stat. at 872 (application of other laws and treaties "in the Creek Nation"); ¶ 42, 31 Stat. at 872 (notice through publication in newspapers "having a bona fide circulation in the Creek Nation"); ¶ 43, 31 Stat. at 872 (maintenance of liquor laws "in said nation"). And so did other statutes. *See, e.g.*, Supplemental Agreement, ¶¶ 11, 13, 17–18, 32 Stat. at 502–04; Five Tribes Act, §§ 12, 14, 16, 24, 27, 34 Stat. at 141–43, 146, 148; Oklahoma Enabling Act, § 6, 34 Stat. at 272.

The Original Agreement also reserved lands for tribal purposes. *See* ¶ 24, 31 Stat. at 868. *Solem* explained that retention of lands for tribal purposes "strongly suggests" continued reservation status. *See* 465 U.S. at 474 (explaining "[i]t is difficult to imagine why Congress would have reserved lands for such purposes" if the land was no longer a reservation). "Surplus" Creek lands were not made a part of the public domain or even opened to unrestricted non-

Indian settlement. Congress and the Tribe instead agreed lands not initially claimed as allotments would be used for the Tribe's benefit by equalizing the allotments of Creek citizens. *See* ¶¶ 3, 9, 31 Stat. at 862, 864; *see also* § 7, 34 Stat. at 272.

And instead of making a sum-certain payment to the Creek Nation for all—or even a portion of—its land, the Agreement provided the Tribe would receive an uncertain amount of revenue based on future sales to non-Indian settlers of surveyed town lots. *See* ¶¶ 11–15, 31 Stat. at 866; *see also Parker*, 136 S. Ct. at 1079 (finding no intent to diminish where Tribe did not "receiv[e] a fixed sum for all of the disputed lands" because "the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land"); *id.* at 1080 ("Such schemes allow non-Indian settlers to own land on the reservation. But in doing so, they do not diminish the reservation's boundaries." (citation and quotations omitted)).

Thus, not only do the State's statutes lack any language showing disestablishment, they show Congress's continued recognition of the Reservation's boundaries.

3) The State's title and governance arguments

The State's arguments for disestablishment based on Congress's general goals of extinguishing tribal title and establishing a new state government fail. Relying on its first statute—the 1893 appropriations law in which Congress announced the commencement of negotiations—the State argues Congress intended to disestablish the Creek Reservation because Congress aimed for (1) the "extinguishment" of tribal title and (2) the "ultimate creation" of one or more state governments in the Indian Territory. Aplee. Br. at 58

(quoting § 16, 27 Stat. at 645). Congress largely achieved both goals,[61] but the State's arguments fail because they confuse questions of title and governance with the issue before us—the Reservation's boundaries.

a) Title

Whether a reservation has been disestablished or diminished depends on whether its boundaries were erased or constricted, not on who owns title to land inside the lines. "This distinction between a property's title and a reservation's territory is important." *Shawnee Tribe*, 423 F.3d at 1220 n.17. Congress has defined "Indian country" to include "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(a). Based on this definition, the Supreme Court has accepted the "inescapable" conclusion that allotment alone does not terminate a reservation. *Mattz*, 412 U.S. at 504. "[A]djudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law." *Navajo Tribe*, 809 F.2d at 1475 (footnote and quotations omitted). In other words, who has title is not the same question as whether Congress has erased or altered a reservation's boundaries. *See Yazzie*, 909 F.2d at 1394 (observing "the distinction between title and boundary [is] an important one"); *see also Solem*, 465 U.S. at 470 ("[N]o matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

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[61] Tribal title was never fully extinguished because, as we explained in *Indian Country, U.S.A.*, the Creek Nation has retained title to some lands within the Reservation. 829 F.2d at 976.

The allotment of Creek lands—the transfer of title from the Tribe to its members—does not mean Congress disestablished the Creek Reservation. Allotment can be "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497; *see Navajo Tribe*, 809 F.2d at 1475 ("[A]llotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status." (quotations omitted)); *see also Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)). *Solem* provides the framework for the required case-by-case evaluation, and here the State presents no language showing Congress altered the Creek Reservation's boundaries. Its focus on the extinguishment of tribal title and the shift to individual ownership misses the mark because "the Supreme Court has required that specific congressional intent to diminish *boundaries* and not just Indian land titles be clearly established." *Yazzie*, 909 F.2d at 1394–95. As the Creek Nation explains, the allotment of Creek lands "effectuate[d] an uncompensated change from communal title to title in severalty," but this "transfer of title sa[id] nothing about reservation boundaries." Creek Nation Br. at 15.

b) Governance

Neither do changes in governance over the Creek Reservation show that Congress disestablished the Reservation. The State argues the erosion of Creek governmental authority and the creation of Oklahoma demonstrate Congress disestablished the Creek Reservation. For three reasons, we disagree.

First, a tribal government's *powers* and its reservation's *boundaries* are not the same thing. At times, the State's brief recognizes this point. *See* Aplee. Br. at 89

(arguing Mr. Murphy has "confuse[d] the question of whether the Nation was dissolved as a political entity with the issue in this case, i.e., whether the reservation was disestablished"); *see also id.* at 84 n.33 (noting "the Creek Nation continued to exist as a political entity"). But the State's attempt to tie Congress's regulation of the Creek government's authority to what Congress must have intended regarding the Reservation's borders fails to satisfy *Solem*'s step one. *See* 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries" (quotations omitted)).[62]

Second, even if the State could show that dissolution of a tribal government is relevant to disestablishing a reservation, that would not mean the Creek Reservation has been disestablished. This is so because Congress never dissolved the Creek government. Even when Congress contemplated the *future* dissolution of the Creek government, it continued to recognize the Tribe's governmental authority within the Reservation's boundaries. *See, e.g.*, Original Agreement, ¶ 42, 31 Stat. at 872. Thirty years ago, this court explained:

> Although Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority. Congress

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[62] The State's contention that regulation of the tribal government indirectly reveals what Congress thought about the Reservation's borders may more appropriately be a step-two argument about the contemporary understanding of the Acts, rather than a step-one textual argument. Either way, it fails to show Congress disestablished the Creek Reservation's boundaries.

> subsequently repudiated its earlier policies of termination and enacted legislation designed to restore governmental powers to the Oklahoma tribes.

Indian Country, U.S.A., 829 F.2d at 981 (citation omitted). And, as all parties agree, the Creek government continues to exist today.

Third, Oklahoma's admission into the Union is compatible with the Creek Reservation's continuation. States and reservations co-exist throughout the country. *See, e.g.*, *Parker*, 136 S. Ct. at 1076 (Omaha Indian Reservation within Nebraska); *Solem*, 465 U.S. at 465–66 (Cheyenne River Sioux Reservation within South Dakota); *Indian Country, U.S.A.*, 829 F.2d at 976 (Creek Reservation within Oklahoma); *see also Donnelly v. United States*, 228 U.S. 243, 270–72 (1913) (holding California's admission did not affect federal jurisdiction over murder on Indian reservation).

In sum, the eight statutes do not, individually or collectively, show that Congress disestablished the Creek Reservation. They lack any of the "hallmarks of diminishment," *Parker*, 136 S. Ct. at 1079, and what they do say supports the view of Mr. Murphy and the Creek Nation that the 1866 Reservation borders continue to exist. The State's arguments about tribal title and governance miss the mark. Its case for disestablishment has "fail[ed] at the first and most important step." *Id.* at 1080.

b. Step Two: Contemporary Historical Evidence

When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires "unambiguous evidence" that "*unequivocally* reveals" congressional intent. *Parker*, 136 S. Ct. at 1080–81 (alterations

and quotations omitted); *see also Solem*, 465 U.S. at 478 ("[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish [a reservation].").

At step two of the *Solem* analysis, courts consider how pertinent legislation was understood to affect the reservation when it was enacted. Evidence of this contemporary understanding may include the negotiations between the tribe and the federal government, congressional floor debates, and committee reports about the relevant statues. *See Solem*, 465 U.S. at 476–78; *see also Wyoming*, 849 F.3d at 874–75 (considering earlier, failed legislation as indicative of intent).

We have relied on step-two evidence to find disestablishment. In *Osage Nation*, we concluded Congress had disestablished the Osage Reservation, despite an absence of clear textual evidence, because we found "the legislative history and the negotiation process [made] clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act." 597 F.3d at 1125.[63]

The State argues the contemporary historical evidence shows Congress intended to disestablish the Creek Reservation. Mr. Murphy and the Creek Nation contend there is no unequivocal historical evidence of

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[63] In *Osage Nation*, we referred in passing to the Creek Reservation as disestablished, *see* 597 F.3d at 1124, but the disestablishment or diminishment of the Creek Reservation was not before us in that case; the Creek Nation was not a party and therefore was not heard; and the court performed no *Solem* analysis regarding the Creek Reservation. The State acknowledges *Osage Nation* does not bind us here. *See* Aplee. Br. at 93 ("[T]his Court's statement that the Creek reservation was disestablished was dicta . . . .").

disestablishment. Instead, they argue the evidence supports continued recognition of the Creek Nation's borders during the relevant period. The mixed evidence we discuss below falls short of "*unequivocally* reveal[ing]" that Congress disestablished the Creek Reservation. *Parker*, 136 S. Ct. at 1080 (quotations omitted).[64]

i. The State's evidence

The State's step-two evidence comes from the years preceding the 1901 Original Allotment Agreement. On their own, pre-1901 understandings do little to advance the analysis because the State "does not dispute that the reservation was intact in 1900." Aplee. Br. at 75 n.25. But we understand the State to argue that Congress had a pre-1900 intention to disestablish the Creek Reservation and that this intention carried through later legislation. *See Wyoming*, 849 F.3d at 878–79 (finding a "continuity of purpose" and stating "Congress's consistent attempts . . . to purchase the disputed land compel the conclusion that this intent continued through the passage of the 1905 Act").

The State largely relies on court decisions discussing Creek history as opposed to primary sources from the relevant time period. *See* Aplee. Br. at 69–70 (citing *Woodward*, 238 U.S. at 293; *Sizemore v. Brady*, 235

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[64] Had the State chosen to present its eight-statute, cumulative-effect argument as step-two contextual evidence—as opposed to step-one textual evidence—we would still conclude Congress did not disestablish the Creek Reservation. The eight statutes reveal a congressional hostility to Creek independence consistent with the assimilationist impulse of the era. *See Solem*, 465 U.S. at 466–69. But they do not show, and certainly not unequivocally, "a specific congressional purpose" to disestablish the Reservation's borders. *Id.* at 469. As our step-two discussion demonstrates, the contemporary historical evidence that the Reservation was disestablished is mixed.

U.S. 441, 447 (1914); *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 (1899); *United States v. Hayes*, 20 F.2d 873, 888 (8th Cir. 1927); *Harjo*, 420 F. Supp. at 1110). Many of these cases were decided years after the allotment of Creek lands and after Oklahoma became a state, thus providing second-hand evidence of any contemporaneous historical understanding. To the extent the State's cases discuss legislative documents from the era, we look to the documents themselves.

1) 1892 Senate debate

The State cites *Hayes* for its earliest historical evidence of Congress's intent to disestablish the Creek Reservation. *Hayes*, a 1927 decision by the Eighth Circuit, discussed an 1892 Senate floor debate in which Senators Jones and Platt opposed a joint resolution proposing to create a commission to negotiate with the Five Civilized Tribes to induce them to allot their lands. *See* 20 F.2d at 879–82 (summarizing debate). Senator Jones argued the government's goal should be to induce the Indians "to abandon their tribal organizations and their tribal governments and to become citizens of the United States." 24 Cong. Rec. 98 (Dec. 13, 1892). Allotment should be offered, he said, *in exchange for* the dissolution of tribal governments. *Id.* He argued the joint resolution would "give away the single advantage we have." *Id.*

Senator Platt thought the "real question" was whether the country could "endure five separate, independent, sovereign, and almost wholly foreign governments within the boundaries of the United States." *Id.* at 100. Although acknowledging "[t]he United States conveyed to each of the five civilized tribes their lands in fee simple, and agreed that they should never be included in any Territorial or State government, so long as the tribes continued to exist and occupy the

lands," he contended things had changed. *Id.* The "original idea" had been "that white people were not to dwell in that country," but he thought the influx of white settlers into the Indian Territory showed the Tribes no longer wished to remain isolated. *Id.* The changing demographic situation required new governing structures. *Id.* at 101–02. Elimination of the tribal governments, he argued, would eventually have to happen with or without the Tribes' consent. *Id.* at 102. Senator Platt also pointed out the Committee on Indian Affairs was drafting a bill to create a commission "much wider in scope than is contained in the joint resolution." *Id.*

The joint resolution "died upon the table without reference to committee," *Hayes*, 20 F.2d at 880 (quotations omitted), but, as discussed above, Congress created the Dawes Commission the next year though the 1893 Act, which instructed the Commission to pursue the purchase or allotment of tribal lands and to secure conditions "suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory," § 16, 27 Stat. at 645.

This legislative history of a failed resolution falls far short of what would permit us to find disestablishment. "[I]solated statements" from a few legislators do not show that Congress disestablished a reservation, *Parker*, 136 S. Ct. at 1080, especially when, as here, the discussion concerns tribal title and governance rather than a reservation's boundaries.

2) 1894 Senate committee report

Next, the State looks to an 1894 report from a Senate select committee on the Five Civilized Tribes discussed in *Stephens*, an 1899 Supreme Court decision involving the constitutionality of laws regulating

the Indian Territory. *See* 174 U.S. at 483. The report noted 1890 census figures showing the white population in the Indian Territory greatly outnumbering the Indian population. S. Rep. No. 53-377, at 6 (1894). Within the Indian Territory there were "[f]lourishing towns . . . composed wholly of white people." *Id.* To the committee, this state of affairs undercut the isolationist notion undergirding earlier treaties:

> It must be assumed . . . that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever.

Id. at 7.

The committee report also commented on the state of land ownership and governance within the Indian Territory. Although the Tribes held title for the benefit of all their citizens, the report found that some tribal citizens, "frequently not Indians by blood but by intermarriage," had managed to take effective control over large swaths of the best agricultural land and earn private income by renting out sections of the land. *Id.* at 11–12. The report observed that this development disadvantaged many tribal citizens and the United States might have to intervene to ensure that tribal holdings were administered for the benefit of all a Tribe's members. *Id.* The report viewed the Tribes in the Indian Territory as incapable of reforming the situation, labelling "their system of government" as

"not only non-American" but "radically wrong." *Id.* at 12. "There can be no modification of the system. It can not be reformed. It must be abandoned and a better one substituted." *Id.* Convinced change was needed, but "not car[ing] to . . . suggest what . . . will be the proper step for Congress to take," the committee simply noted that the Dawes Commission was hard at work, and said it would "wait and see." *Id.* at 12–13.

This report describing 1890s conditions does not address whether Congress understood its later reforms would disestablish the Creek Reservation. And again, the State's contextual evidence concerns title and governance and does not speak to the reservation question.

3) Other sources

The State references an 1895 report from the Dawes Commission to Congress, which stated that the "so-called governments" in the Indian Territory were "wholly corrupt, irresponsible, and unworthy to be longer trusted" with the lives and property of Indian citizens. Dep't of the Interior, H.R. Doc. No. 54-5, at XCV (1st Sess. 1895). The Commission predicted the situation would not "remain peaceabl[e]" if the white population were excluded from the governance arrangement and stressed the United States was "bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed." *Id.* at XC.

The State argues an 1897 report by the Secretary of the Interior similarly found that a uniform system of government would have to be provided for the Indian Territory. The State also observes that the Creek Nation and the Dawes Commission negotiated agreements that were rejected by either the Tribe or Con-

gress before both sides agreed to the Original Allotment Agreement, but the State does not cite any particular provisions in these earlier, proposed deals to argue they reveal a contemporary understanding that Congress intended to disestablish or diminish the Creek Reservation.

These materials fail to show that Congress intended to disestablish the Creek Reservation by enacting any of the eight statutes.

ii. Mr. Murphy's and the Creek Nation's evidence

Mr. Murphy contends there is no unequivocal historical evidence supporting disestablishment. To the contrary, he and the Tribe cite sources from both before and after the 1901 Original Agreement to argue the Creek Nation's borders remain intact.

1) 1894 Dawes Commission records

The Creek Nation points to records from the Dawes Commission's early years. Its 1894 report to Congress discussed the Commission's negotiations and explained the Tribes had refused to discuss changes "in respect either to their form of government or the holdings of their domains." Dep't of the Interior, H.R. Doc. No. 53-1, at LIX–LX (3d Sess. 1894). The Commission explained to Congress it had proposed allotment after "abandon[ing] all idea of purchasing" tribal lands because "the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government." *Id.* at LVX. The same report included a copy of the terms the Commission had submitted to the Creek Nation—the propositions "upon which [the Commission] proposed to negotiate." *Id.* at LX–LXI. The eighth proposition stated that, if an agreement was reached, Congress would be allowed to form a

territorial government "over the territory of the Creek Nation." *Id.*

2) 1895 Dawes letter

Next, the Tribe points to an 1895 letter from Chairman Dawes to the Creek Nation's principal chief explaining:

> [T]he Commission have not come here to interfere at all with the administration of public affairs in these nations, or to undertake to deprive any of your people of their just rights. On the other hand, it is their purpose and desire, and the only authority they have, to confer with you upon lines that will result in promoting the highest good of your people and securing to each and all of them their just rights under the treaty obligations which exist between the United States and your nation.

H.R. Doc. No. 54-5, at LXXXI. These treaty obligations, the Creek Nation argues, included the 1866 treaty's recognition of the Tribe's territorial integrity.

3) 1900 Attorney General opinion

The Creek Nation also relies on a 1900 Attorney General opinion, which addressed the "conditions now existing in the Indian country occupied by the Five Civilized Tribes" to argue the 1898 Curtis Act did not affect the Reservation's boundaries. 23 U.S. Op. Att'y Gen. 214, 215 (1900), *available at* 1900 WL 1001. Responding to an inquiry from the Secretary of the Interior about the presence of non-Indians in the Indian Territory, the Attorney General explained that the Tribes, even after passage of the Curtis Act, still had the power to exclude intruders and to set the terms upon which non-members could enter the

Tribes' lands. *See id.* at 215–18. The opinion said the Tribes could regulate activity within their borders because, although outsiders could purchase town lots, "the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." *Id.* at 217. Tribal laws "requiring a permit to reside or carry on business in the Indian country" were still in effect. *Id.* Non-members grazing cattle or otherwise occupying Indian lands were "simply intruders" who "should be removed, unless they obtain such permit and pay the required tax, or permit, or license fee." *Id.* at 219. The Attorney General concluded the Secretary of the Interior had

> the authority and duty . . . to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remo[v]e all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

Id. at 220; *see also Maxey v. Wright*, 54 S.W. 807, 809–10, 812 (Indian Terr.) (upholding Creek occupancy tax imposed on non-member lawyers practicing law within the Creek Nation), *aff'd*, 105 F. 1003 (8th Cir. 1900).

4) Post-allotment evidence

Mr. Murphy and the Tribe argue contemporary historical evidence shows an understanding that the Creek Nation's borders continued after allotment. In its report to Congress in 1900, the Dawes Commission

reflected on what its negotiations had—and had not—achieved:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.

Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900).

Mr. Murphy points out that, in the years immediately following passage of the allotment agreements, the regional federal circuit court with jurisdiction over the Indian Territory continued to recognize the Creek Nation's borders. In *Buster*, federal agents enforced the Creek Nation's licensing fee on trade "within its borders" by closing the businesses of non-Indians who had refused to pay. 135 F. at 949–50. The non-Indian business owners sought to enjoin federal enforcement of the tax and argued the Creek Nation's power had been withdrawn by the Original and Supplemental Allotment Agreements, which authorized the presence of individuals in lawful possession of town lots. *Id.* at 950. The Eighth Circuit held that, although allotment had altered title arrangements, the Creek Nation's power to govern the area was "not conditioned or

limited by the title to the land." *Id.* at 951. "Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders . . . by the ownership [or] occupancy of the land within its territorial jurisdiction by citizens or foreigners." *Id.* at 952. The Creek Nation retained "its power to fix the terms upon which noncitizens may conduct business *within its borders*." *Id.* (emphasis added). The Eight Circuit said in summation:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business of those who violate them, and thereby preventing the continuance of that violation.

Id. at 958.[65]

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[65] The Supreme Court has questioned *Buster*'s approach to Indian taxing authority, but we consider the case only as a contemporary source revealing an understanding that Congress had not disestablished the Creek Reservation.

In *Atkinson Trading Co.*, the Supreme Court invalidated a hotel occupancy tax challenged by a non-Indian who owned a hotel within the borders of the Navajo Reservation. 532 U.S. at 647–48, 659. In doing so, the Court made clear that it has never endorsed *Buster*'s broad statement "that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" *Id.* at 653 n.4 (quoting 135 F. at 951). For our purposes, the correctness

iii. Analysis

The State's evidence at step two largely speaks to changes (or anticipated changes) in title and governance. It does not show that Congress understood it was disestablishing the Creek Reservation. Although Mr. Murphy and the Creek Nation present counter evidence showing a continuing understanding that the Creek Reservation's borders remained intact, we need not settle which side has the stronger argument about the contemporary historical evidence. Under *Solem*, our inquiry is simpler. Because no clear textual evidence shows Congress disestablished the Creek Reservation at step one, it is enough for us to say at step two that the "historical evidence in no way '*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Parker*, 136 S. Ct. at 1080 (alteration and emphasis in original) (quoting *Solem*, 465 U.S. at 471).

None of the step-two evidence, whether viewed in isolation or in concert, shows unmistakable congressional intent to disestablish the Creek Reservation. The State's historical evidence supports the notion that Congress intended to institute a new government in the Indian Territory and to shift Indian land ownership from communal holdings to individual allotments. But this does not show, unequivocally or otherwise, that Congress had erased or even reduced the Creek Reservation's boundaries. Even if the State's evidence offers some suggestion of a contemporary understanding that the Creek Reservation was disestablished, Mr. Murphy and the Creek Nation have

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of *Buster*'s pronouncements on Indian taxing authority is irrelevant. Mr. Murphy and the Creek Nation rely on *Buster* simply as contemporary historical evidence.

marshalled evidence showing an understanding that the Reservation's borders continued. The step-two evidence is at most debatable, and we need not parse it further because ambiguous evidence cannot overcome the missing statutory text at step one. *See Hagen*, 510 U.S. at 411 ("Throughout the inquiry, we resolve any ambiguities in favor of the Indians . . . .").

After the first two steps, the statutory-text analysis fails to show that Congress disestablished or diminished the Creek Reservation, and there is no unequivocal evidence of a contemporaneous understanding that the legislation terminated or redrew the Creek Nation's borders at step two. We turn to step three.

c. Step Three: Later History

We consider at step three "federal and local authorities' approaches to the lands in question and . . . the area's subsequent demographic history." *Shawnee Tribe*, 423 F.3d at 1222; *see Solem*, 465 U.S. at 471; *see also Parker*, 136 S. Ct. at 1081 (considering tribal presence in contested territory). "Congress's own treatment of the affected areas," especially in the years immediately following passage of legislation that opens a reservation to non-Indian settlement, "has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities" treated the disputed area. *Solem*, 465 U.S. at 471. Step three also concerns "who actually moved onto opened reservation lands," *id.*, but later demographic facts are "the least compelling" evidence for disestablishment or diminishment because "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation." *Yankton Sioux Tribe*, 522 U.S. at 356.

Solem provides that, as compared to steps one and two, step-three evidence is considered "[t]o a lesser extent." 465 U.S. at 471. In its most recent decision applying *Solem*, the Supreme Court observed that although it has "suggest[ed]" step-three evidence "might reinforce" a conclusion based on statutory text, it "has never relied solely on this third consideration to find diminishment." *Parker*, 136 S. Ct. at 1081 (alterations and quotations omitted); *see also Wyoming*, 849 F.3d at 879 ("[S]ubsequent events cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." (quotations omitted)).

We proceed to discuss (i) the treatment of the area and (ii) its demographic history. The conflicting step-three evidence discussed below does not allow us to say that Congress disestablished the Creek Reservation.

i. Treatment of the area

1) Congress

Both sides cite evidence to show what later Congresses understood about the Creek Reservation's existence. We start with the earliest examples.

The Creek Nation cites the following statutes in arguing Congress continued to recognize the Reservation's boundaries following passage of the allotment agreements: Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204 (granting Secretary of the Interior authority to sell "the residue of lands in the Creek Nation"), *repealed by* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1072 (revoking Secretary's authority); Act of March 3, 1909, ch. 263, 35 Stat. 781, 805 (providing for "equalization of allotments in the Creek Nation"); and Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 (appropriating money for "the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"). We find these laws carry some weight

because, within step three, *Solem* emphasizes the years "immediately following" passage of the relevant laws. *See* 465 U.S. at 471; *see also Hagen*, 510 U.S. at 420 (repeating the Court's "longstanding observation that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (brackets and quotations omitted)).

The Creek Nation cites other statutes showing that reservations continued to exist in Oklahoma, though they do not speak directly to the Creek Reservation. *See* Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (regulating oil and gas leases on "unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation"); Act of June 26, 1936, ch. 831, 49 Stat. 1967, 1967 (authorizing Secretary of the Interior to acquire land and water rights "within or without existing Indian reservations" in Oklahoma).

The State points to more recent statutes in which Congress defined "reservation" to include, among other things, "former Indian reservations in Oklahoma." Aplee. Br. at 85.[66] These laws also include existing reservations within their definitions, however, and none of them reference the Creek Reservation as being disestablished in particular. Congress's choice to include former reservation lands in Oklahoma within various regulatory programs does not show that Congress has disestablished the Creek Reservation.

The State also cites two congressional committee reports. First, a 1935 report by a Senate committee

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[66] The State cites the following examples: 12 U.S.C § 4702(11); 16 U.S.C. § 1722(6)(C); 25 U.S.C. §§ 1452(d), 2020(d)(1)–(2), 3103(12), 3202(9); 29 U.S.C. § 741(c); 33 U.S.C. § 1377(c); 42 U.S.C. §§ 2992c(2), 5318(n)(2). Within 29 U.S.C. § 741, "reservation" is actually defined in subsection (d), and within 42 U.S.C. § 2992c, "Indian reservation" is defined in subsection (3).

said that in Oklahoma, as the result of allotment, "Indian reservations as such have ceased to exist." S. Rep. No. 74-1232, at 6 (1935). But as the Creek Nation argues, the legislation associated with the report, the Oklahoma Indian Welfare Act, referenced "existing Indian reservations." *See* § 1, 49 Stat. at 1967. Second, the State argues "[a] survey in 1952 referred to the lands of the Five Civilized Tribes as areas, rather than reservations." Aplee. Br. at 85 (citing H.R. Rep. No. 82-2503, at 745, 753, 777, 793, 952 (1952)). Mr. Murphy and the Creek Nation do not address this report, but the State does not explain why "areas" and "reservations" cannot refer to the same land.

Altogether, these conflicting signals from later Congresses do not overcome the lack of evidence at steps one and two. Given "the textual and contemporaneous evidence" in this case, "confusion in the subsequent legislative record does nothing to alter our conclusion" that the Creek Reservation's borders still exist. *Hagen*, 510 U.S. at 420; *see also id.* ("The subsequent history is less illuminating than the contemporaneous evidence.").

2) Executive

The parties' evidence from the executive branch also is mixed. The Creek Nation contends that the Bureau of Indian Affairs continued to regard the Reservation as intact in the early years of the twentieth century. The BIA's annual reports following Creek allotment and Oklahoma statehood consistently included the Creek Nation in tables summarizing reservation statistics. *See* Creek Nation Br., App'x B. Similarly, the Department continued to include the Creek Nation on its "Maps Showing Indian Reservations within the Limits of the United States." *See id.* App'x C (maps from 1900–14).

But the State argues a later BIA regulation concerning land acquisition policies shows that the BIA concluded the Creek Reservation was disestablished because the regulation defined "Indian reservation" to mean:

> that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2(f) (2016).[67] Even if this evidence supports the State, it merely creates a conflict with the other BIA evidence.

The Supreme Court has said that government officials' later treatment of the disputed area "has 'limited interpretive value.'" *Parker*, 136 S. Ct. at 1082 (quoting *Yankton Sioux Tribe*, 522 U.S. at 355); *see also Solem*, 465 U.S. at 469 ("The first and governing principle is that only *Congress* can divest a reservation of its land and diminish its boundaries." (emphasis added)). And, more generally, the "subsequent treatment of the disputed land cannot overcome the statutory text" when the relevant laws are "devoid of any language" indicating Congress intended to disestablish a reservation. *Parker*, 136 S. Ct. at 1082.

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[67] The regulation dates to 1980. *See* Land Acquisitions, 45 Fed. Reg. 62034, 62036 (Sept. 18, 1980) (announcing regulation's finalization).

3) Federal courts

Both sides point to passing references in federal court decisions across the decades that reveal conflicting understandings of the Creek Reservation's status.

The State invokes a handful of twentieth-century cases "indicat[ing], in dicta, a widely held belief that the reservation was disestablished." Aplee. Br. at 78–79 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973); *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 602–03, 608 (1943); *Grayson v. Harris*, 267 U.S. 352, 353 (1925); *Woodward*, 238 U.S. at 285; *McDougal v. McKay*, 237 U.S. 372, 383 (1915); *Washington v. Miller*, 235 U.S. 422, 423 (1914); *Harjo*, 420 F. Supp. at 1143). But the State's characterization of these cases is overstated. *McClanahan*, for instance, does not discuss the Creek Nation at all. And in *Woodward*, the Supreme Court described the case as involving a 160-acre tract "formerly part of the domain of the Creek Nation," but, in the next sentence, the opinion explained "[t]he tract was allotted to Agnes Hawes, a Creek freedwoman." 235 U.S. at 285. The Court's description of the land is consistent with the transfer of title from the Creek Nation, which formerly owned it, to Ms. Hawes. As previously explained, a change in title from tribal to individual ownership does not disestablish a reservation. Other cases the State cites suffer the same flawed understanding that allotment had terminated the reservation. *See Grayson*, 267 U.S. at 353, 357 (describing allotted lands "lying within the former Creek Nation"); *Washington*, 235 U.S. at 423 (referring to "lands within what until recently was the Creek Nation in the Indian Territory"). To the extent the State's cases reflect a later understanding that the Creek Reservation had been disestablished, these references, as the State acknowledges, are dicta.

The Creek Nation argues that "[f]ederal courts in the decades after allotment sometimes subscribed to [the] erroneous assumption" that the Creek Reservation had been disestablished based on a mistaken belief that the tribal government had been dissolved. Creek Nation Br. at 32. For example, in *Turner v. United States*, the Court of Claims remarked—incorrectly—that the "Creek Nation of Indians kept up their tribal organization . . . until the year 1906, at which date the tribal government was terminated by the general provisions of [the Original Allotment Agreement]." 51 Ct. Cl. 125, 127 (1916), *aff'd*, 248 U.S. 354 (1919). But, as discussed above, Congress extended the tribal government beyond 1906 and has never dissolved it. *See* § 28, 34 Stat. at 148. The Supreme Court affirmed the Court of Claims' decision and repeated its mistake that "[o]n March 4, 1906, the tribal organization was dissolved pursuant to" the Original Agreement. *Turner*, 248 U.S. at 356. But, as the Court later recognized, the Creek Nation "still exists" and has "resume[d] some of its former powers." *Seber*, 318 U.S. at 718 & n.23.

As we have explained, the question of tribal governmental powers is distinct from reservation boundaries, but the Creek Nation persuasively argues these clear errors are an "indication of just how shaky such judicial assumptions were" in the decades after allotment. Creek Nation Br. at 32–33.

Scattered dicta in later court decisions do not justify a conclusion that Congress disestablished the Creek Reservation. We have undertaken the three-part *Solem* analysis *because* no Supreme Court or Tenth Circuit case has addressed the question. *See Indian Country, U.S.A.*, 829 F.2d at 975 (reserving issue of "whether the exterior boundaries of the 1866 Creek Nation have been disestablished").

4) Oklahoma

The Creek Nation acknowledges the State "asserts considerable governmental authority over the Creek reservation." Creek Nation Br. at 37. Oklahoma's general exercise of authority over the former Indian Territory has included criminal prosecutions of Indians, but we agree with Mr. Murphy and the Creek Nation that the exercise of State authority has not disestablished the Creek Reservation.

In *Ex parte Nowabbi*, Oklahoma convicted a member of the Choctaw Tribe in state court of murdering another tribal member on the victim's allotment. 61 P.2d 1139, 1141–42 (Okla. Crim. App. 1936), *overruled by Klindt*, 782 P.2d 401. The defendant argued the federal district court had exclusive jurisdiction. *Id.* at 1143. The OCCA concluded state jurisdiction was proper and said Congress had failed to reserve federal jurisdiction for crimes committed within the former Indian Territory. *Id.* at 1154, 1156.[68]

Since then, however, the state courts have changed course. In 1989, the OCCA concluded *Nowabbi* had erred in holding Oklahoma had jurisdiction to prosecute an Indian defendant for a murder committed on an Indian allotment. *See Klindt*, 782 P.2d at 404 ("There is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion. . . . *Nowabbi* is hereby overruled."); *see also Cravatt*, 825 P.2d at 280 (vacating Indian defendant's state-court conviction

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[68] The Oklahoma Attorney General similarly concluded in 1979 that Oklahoma has jurisdiction over the former Indian Territory: "Due to the dissolution of the Indian tribes of former 'Indian Territory' as *governments of limited sovereignty*, there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists." 11 Okla. Op. Att'y. Gen. 345 (1979), *available at* 1979 WL 37653, at *8–9.

for murder committed on allotment). These cases addressed allotments, not the reservation question. Still, they show that Oklahoma has shifted away from its earlier position that there is no Indian country in the former Indian Territory.

The State has not provided us with other examples of Oklahoma prosecuting Indians for murders committed within the Creek Reservation,[69] but such cases would be of little value because the Supreme Court has explained that even when a state's exercise of jurisdiction goes unquestioned, lands retain their Indian country status until Congress decides otherwise. In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court rejected an argument by the State of Mississippi that the federal government's failure to assert its jurisdiction had made the State's exercise of jurisdiction proper:

> [The State argues] that since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians. Because of this abandonment, and the long lapse in the federal recognition of a tribal organization

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[69] In the 1990s, we rejected an attempt by the federal government to allow Oklahoma to prosecute a Creek citizen for the murder of another Creek citizen. *Sands*, 968 F.2d at 1061. We did not address the reservation issue, however, because we determined the crime occurred on an allotment—and thus in Indian country under 18 U.S.C. § 1151(c). *Id.* at 1062. After prosecuting the defendant in federal court, the federal government "urge[d] us to adopt its frequently raised, but never accepted, argument that the State of Oklahoma retained jurisdiction over criminal offenses in Indian country." *Id.* at 1061. We rejected the argument and affirmed the defendant's federal conviction. *Id.* at 1061–63, 1067.

> in Mississippi, the power given Congress "to regulate Commerce . . . with the Indian Tribes," Const. Art. I, § 8, cl. 3, cannot provide a basis for federal jurisdiction. To recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary.
>
> We assume for purposes of argument, as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But . . . we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652–53 (brackets and footnote omitted); *see also Indian Country, U.S.A.*, 829 F.2d at 974 ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands.").

Oklahoma's exercise of jurisdiction within the Creek Reservation is not a proper basis for us to conclude that Congress disestablished the Reservation.

5) Creek Nation

The Creek Nation has maintained a significant and continuous presence within the Reservation. The tribal government, which was never extinguished, saw many of its powers restored when Congress passed OIWA in 1936. *See Indian Country, U.S.A.*, 829 F.2d at 981. Later, "[i]n 1979, the Creeks reorganized their tribal government . . . and adopted a new Creek Constitution, which was approved by the United States Department of the Interior." *Id.* at 970. Today, the tribal government maintains a capital complex in Okmulgee and provides extensive services within the Creek Nation's borders. *See* Creek Nation Br., App'x D (maps reflecting Tribe's capital complex and locations of community centers, medical centers, and emergency response teams throughout the Reservation). The Creek Nation further contends it applies its traffic laws throughout the territory and supports traditional churches and ceremonial grounds on the Reservation. *Id.* at 37.[70] Mr. Murphy also observes the Creek Nation has entered into deputation agreements for law enforcement services "within the exterior boundaries of the

Muscogee (Creek) Nation." Aplt. Br., Attach. F. The Creek Nation's continued presence and activity provides a much stronger case for reservation continuation than in *Parker*, where the Supreme Court held a reservation was intact notwithstanding the fact that "the Tribe was almost entirely absent from the disputed territory for more than 120 years." 136 S. Ct. at

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[70] *See also* The Muscogee (Creek) Nation, http://www.mcn-nsn.gov/services/# (providing overview of tribal services including, among others, language programs, environmental services, family violence prevention programs, historical and cultural preservation programs, senior services, and education and transportation programs) [https://perma.cc/Q82C-ZVZY].

1081. The value of this evidence may be slight, but it weighs in favor of Mr. Murphy and the Creek Nation.[71]

ii. Demographics

There is a large, non-Indian population within the Creek Reservation. The State argues that, even "[b]y 1906, four-fifths of the persons living in Indian Territory were non-Indian." Aplee. Br. at 86 (citing H.R. Rep. No. 59-496, at 10 (1906)). In 2000, the year Mr. Murphy was convicted in McIntosh County,[72] the census determined that—of a total county population of 19,456—14,123 people were white (73%) compared to 3,152 people who identified as American Indian or Alaska Native (16%).[73] And within the Reservation but beyond McIntosh County lies the city of Tulsa with a population, the State maintains, that is only 5.3% Indian. *Id.* at 86 (citing 2015 census figures).

Mr. Murphy argues this demographic evidence is unhelpful because "[t]he increase of non-Indian intruders into Indian Territory was occurring before the allotment acts and Enabling Act were passed," and even before allotment and Oklahoma statehood, "the [Creek] Nation's citizens were the minority within

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[71] Mr. Murphy has submitted other step-three materials in the form of reports and legislative history criticizing the Oklahoma probate courts for their handling of Indian estates in the years after allotment. *See* Aplt. Br., Attach. E. Similarly, he cites a lengthy 1928 report commissioned by the Department of the Interior, *see id.* at 42 n.19 (citing Institute for Government Research, "The Problem of Indian Administration" (1928)), on which the State also draws. We have considered these materials, but they do not affect our conclusion.

[72] The 1866 boundaries of the Creek Reservation, however, cover more than McIntosh County.

[73] *See* United States Census Bureau, "American FactFinder," Profile of General Demographic Characteristics: 2000 [https://perma.cc/LH7M-32WX].

their own territory." Aplt. Br. at 65–66. Although many non-Indians have come to live in the area, the Tribe points out that approximately half of its members continue to live within the 1866 borders of the Reservation.

The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation. *See Parker*, 136 S. Ct. at 1082 (explaining it is not the "role" of courts to "rewrite" earlier statutes "in light of . . . subsequent demographic history" (quotations omitted)). *Solem* acknowledged that "[r]esort to subsequent demographic history is . . . an unorthodox and potentially unreliable method of statutory interpretation." 465 U.S. at 472 n.13; *see also Wyoming*, 849 F.3d at 887 n.6 (Lucero, J., dissenting) (applying step three but observing "[t]he demographic makeup of an area decades or more following passage of a statute cannot possibly tell us anything about the thinking of a prior Congress"). We take account of it as part of our step-three analysis but do not rest our decision upon it.

iii. Step-three concluding comment

When steps one and two "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must accord "traditional solicitude" to Indian tribes and conclude "the old reservation boundaries" remain intact. *Solem*, 465 U.S. at 472. Such is the case here. None of the step-three evidence allows us to conclude that Congress disestablished the Creek Reservation.

IV. CONCLUSION

Applying *Solem*, we conclude Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a). Because Mr. Murphy is

an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction. *See* 18 U.S.C. § 1153(a).

Mr. Murphy's state conviction and death sentence are thus invalid. The OCCA erred by concluding the state courts had jurisdiction, and the district court erred by concluding the OCCA's decision was not contrary to clearly established federal law. We therefore reverse the district court's judgment and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254. The decision whether to prosecute Mr. Murphy in federal court rests with the United States. Decisions about the borders of the Creek Reservation remain with Congress.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-03-443-RAW-KEW

PATRICK DWAYNE MURPHY,

Petitioner,

vs.

MARTY SIRMONS, Warden, Oklahoma State Penitentiary,

Respondent.

OPINION AND ORDER

Petitioner Patrick Dwayne Murphy was convicted following a jury trial in the District Court of McIntosh County, Case No. CF-1999-164A, of First Degree Murder in violation of 21 O.S.Supp. 1996, § 701.7(A). In accordance with the jury's verdict, Petitioner was on May 18, 2000 sentenced to death. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed his conviction and death sentence. *Murphy v. State*, 47 P.3d 876 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985, 123 S.Ct. 1795, 155 L.Ed.2d 678 (2003).

On February 7, 2002, Petitioner filed an Application for Post-Conviction Relief in Oklahoma Court of Criminal Appeals Case No. PCD-2001-1197. On September 4, 2002, the Court granted relief on the sole issue of Petitioner's claim of mental retardation and remanded the case for an evidentiary hearing. *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). The trial court held an evidentiary hearing and concluded that insufficient evidence existed to create a fact question on the

issue of Petitioner's claim of mental retardation. *See*, Findings filed on November 6, 2002, in the District Court of McIntosh County, Case No. CF-1999-164A. Thereafter, the Oklahoma Court of Criminal Appeals denied Petitioner's application for post-conviction relief and again affirmed Petitioner's sentence. *Murphy v. State*, 66 P.3d 456 (Okla. Crim. App. 2003).

On March 29, 2004, Petitioner filed a second Application for Post-Conviction Relief with the Oklahoma Court of Criminal Appeals raising three grounds for relief, to-wit: 1) the State of Oklahoma lacked jurisdiction to try him because the crime occurred in Indian country; 2) his mental retardation claim had been treated differently than all subsequent mental retardation claims, thereby depriving him of equal protection, and a deprivation of rights guaranteed by the Fifth, Eighth and Fourteenth Amendments; and 3) Oklahoma's protocol and procedures dealing with execution by lethal injection violated the United States Constitution against cruel and unusual punishment. On December 7, 2005, the Oklahoma Court of Criminal Appeals denied relief on issues one and three and remanded the issue of mental retardation to the district court in McIntosh County for a jury trial. *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005).[1] Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C. § 2254.

As a preliminary matter the Court notes that Marty Sirmons is currently the Warden at Oklahoma State Penitentiary. The Court finds, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Marty Sirmons is the proper substituted Respondent and the

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[1] The District Court of McIntosh County has continued this trial several times. Currently, the matter is set for trial on September 10, 2007. *See*, McIntosh County District Court Case No. CF-99-00164A.

Court Clerk shall be directed to note such substitution on the record.

I. RECORDS REVIEWED

This Court has reviewed (1) the First Amended Petition for Writ of Habeas Corpus filed on September 10, 2004; (2) the Second Amended Petition for Writ of Habeas Corpus filed on December 28, 2005; (3) the Combined Response[2] to the First Amended and Second Amended Petitions for Writ of Habeas Corpus filed on April 6, 2007; (4) the Reply filed on May 10, 2007; (5) transcript of Preliminary Hearing held on December 1, 1999 and December 10, 1999, Volumes I and II, respectively; (6) transcript of Motion proceedings held on February 24, 2000; (7) transcript of Motions proceedings held on March 30, 2000; (8) transcript of Motions hearing held on April 6, 2000; (9) transcript of Jury Trial held on April 10, 11, 12, and 13, 2000, Volumes I, II, III, IV, IVA, and V; (10) transcript of Sentencing Proceedings held on May 18, 2000; (11) transcript of Evidentiary Hearing proceedings held on November 18, 2004, Volumes I and II, including exhibits attached thereto; and (12) all other records before the Oklahoma Court of Criminal Appeals which were transmitted to this Court. Although not listed specifically, this Court has reviewed all items filed in this case, with the exception of the transcript of proceedings held on October 29, 2002, including exhibits attached thereto and the transcript of the deposition of Faust Bianco, Jr., Ph.D, taken on October

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[2] On March 30, 2007, this Court ordered Respondent to file a complete response to Petitioner's First Amended Petition and Seconded Amended and Supplemental Petition to allow Respondent an opportunity to exclude those portions of its original response which were no longer applicable to the actual issues herein.

25, 2002, including exhibits attached thereto.[3] *See* Inventory of State Court Record, Dkt. No. 21, filed on July 16, 2004 and Inventory of State Court Record, Dkt. No. 52, filed on November 16, 2006.

As a result, this court finds that the records, pleadings and transcripts of the state proceedings provide all the factual and legal authority necessary to resolve the matters in the petition and, therefore, an evidentiary hearing is unnecessary. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)(*Sumner I*); *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (*Sumner II*).

II. STATEMENT OF THE FACTS

Historical facts found by the state court are presumed correct, unless the petitioner rebuts the same by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Since Petitioner has failed to rebut the facts, as set forth by the Oklahoma Court of Criminal Appeals, this Court hereby adopts the factual findings made by the Oklahoma appellate court.

> In August of 1999, [Petitioner] was living with Patsy Jacobs, his alleged "common-law" wife. Ms. Jacobs had previously lived for three years with George Jacobs, the victim in this case, and had a child by him. [Petitioner] and Patsy had an argument about Jacobs a

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[3] Although these transcripts were designated by the parties, the issue before the state court in the evidentiary hearing held on October 29, 2002, is not currently before this Court. The deposition of Dr. Bianco was apparently introduced in that hearing. Accordingly, other than ascertaining that both of these transcripts relate to an evidentiary hearing on the issue of Petitioner's mental retardation, this Court has not read these transcripts.

couple of days before Jacobs was murdered. [Petitioner] told Patsy that he was going to get Jacobs and his family one by one.

On August 28, 1999, George Jacobs and his cousin Mark Sumka spent most of the day drinking and driving around Okmulgee, Okfuskee, and McIntosh counties. They reportedly drank two bottles of whiskey and numerous beers that day. At 9:30 p.m., they were headed to a Henryetta bar in Jacobs's Dodge Sedan. Jacobs was passed out in the back seat, and Sumka was driving. (Jacobs's post mortem blood alcohol level would later be determined to be .23)

Sumka and Jacobs passed [Petitioner] as he was driving in the opposite direction. Both cars stopped, and [Petitioner] backed up. [Petitioner] told Sumka to kill the car and get out. Meanwhile, two occupants of [Petitioner's] car, Billy Long and Kevin King, exited the car. Alarmed, Sumka drove away.

[Petitioner] and his companions pursued Sumka in [Petitioner's] car. [Petitioner] was eventually able to force Sumka to stop. At that point, someone from [Petitioner's] car arrived at Sumka's car and began hitting Jacobs.

Sumka got out of his car, but was stopped by [Petitioner] who said he was going to do to Jacobs what they had done to him. Sumka could hear the other two men hitting Jacobs. Sumka told [Petitioner] "that was enough, you know, he's passed out." [Petitioner] went over to Jacobs, while Long came over and hit Sumka in the nose. Sumka then saw King drag Jacobs out of a ditch.

Sumka fled momentarily, about one hundred yards from the assault. After five minutes, he decided to return. Upon his arrival, [Petitioner] and his two cohorts told Sumka if he said anything they would kill him and his family. King then smacked Sumka in the jaw. [Petitioner] reportedly instructed King and Long not to hit Sumka again.

Sumka testified that [Petitioner] then took a folding knife he was holding and tossed it into the woods. (The police later recovered this knife.)

Sumka ran over to where Jacobs was laying in a ditch. Jacobs was "barely breathing." Anderson Fields then drove up in another car and asked what was wrong with the guy in the ditch. (He also noticed a fleshy object and blood in the road.) The men told him Jacobs was drunk. They began approaching Fields's car, but he drove away. Fields then phoned the police and drove back to the scene. Everyone was gone. Jacobs lay in the ditch and was barely breathing. Fields found a slash across Jacobs's stomach and chest. His throat had been cut, his face was bloody, and his genitals had been cut off.

Upon [Petitioner's] instructions, Sumka had left the scene with [Petitioner], Long, and King. During the car ride, [Petitioner] told Sumka they had cut Jacobs's throat and chest and had cut off his privates. King told Sumka they had stuffed Jacobs's genitals into Jacobs's mouth. [Petitioner] then told everyone to take off their clothes because he was going to burn them.

The group later went to the home of Mark Taylor, [Petitioner's] cousin. [Petitioner] told Taylor he had killed Jacobs. [Petitioner] said he had cut Jacobs's stomach and throat, had "cut his dick and his nuts off," had shoved his genitalia into his mouth, and had tried to stomp on the victim's head like a pancake.

The group then traveled to King's house, where Jacobs's son George, Jr. was staying. [Petitioner] said he was going to do the same thing to Jacobs's son. But King's mother came out of the house and thwarted this plan. King went inside, and the rest of the group left. [Petitioner] then burned the bag of incriminating clothes.

When [Petitioner] arrived home that night, he told Patsy Jacobs that George Jacobs had been killed and that he had sliced his throat and stomach. Patsy testified [Petitioner] also said he had cut off Jacobs's genitals so "he won't fuck anyone anymore," including her.

When [Petitioner] was arrested, he admitted kicking Jacobs in the ribs and testicles and cutting his penis. He also admitted hearing Jacobs groan during the attack. He said Jacobs was left alive in a ditch; He was breathing and saying, "Oh."

A state criminalist testified that, after the victim's penis was severed, he was dragged to the side of the road, where his neck and chest were cut. Bloodstains on Jacobs's shoes indicate he had been in an upright position for part of the attack. The medical examiner described the cause of death as blood loss from the various cutting wounds, primarily

> the genital and neck wounds. Death was not immediate. Jacobs bled to death in somewhere between four to twelve minutes, perhaps even longer. He described the multiple lacerations and fractures the victim suffered to his face, neck, chest, and abdomen.

Murphy v. State, 47 P.3d 876, 879–880 (Okla. Crim. App. 2002).

Additional facts will be discussed as they become relevant.

III. PETITIONER'S CLAIMS FOR RELIEF

Petitioner's Second Amended Petition (Dkt. No. 54) incorporates by reference his First Amended Petition (Dkt. No. 33) and his Amended Reply to the State of Oklahoma's Response to Petition for A Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Dkt. No. 34), both of which were filed herein on September 10, 2004. In his First Amended Petition, Petitioner raised eight (8) grounds for relief. Two (2) additional grounds were added in Petitioner's Second Amended Petition. Respondent, at the direction of the Court, filed a Combined Response to Petitioner's First and Second Amended Petition on April 6, 2007 (Dkt. No. 56). Petitioner filed a Reply on May 10, 2007 (Dkt. No. 65).

Petitioner's alleged errors can be summarized as follows: (1) ineffective assistance of counsel during the second stage of trial; (2) (a) the evidence was insufficient to support Oklahoma's "heinous, atrocious, or cruel" aggravator; (b) the jury instructions regarding this aggravating circumstance were inadequate; and (c) this aggravator is unconstitutionally vague and overbroad; (3) Oklahoma's "continuing threat" aggravating circumstance is unconstitutionally vague and overbroad; (4) failure to require the

jury to find the aggravating factors outweighed the mitigating factors beyond a reasonable doubt violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights; (5) the victim impact evidence violated Petitioner's constitutional rights to a fundamentally fair sentencing proceeding as guaranteed by the Fifth, Eighth and Fourteenth Amendments; (6) failure to define life without parole denied Petitioner due process of law and the right to a fundamentally fair sentencing proceeding in violation of his Fifth, Eighth and Fourteenth Amendment rights; (7) the trial court erred in admitting Petitioner's post-arrest statement thereby violating Petitioner's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments; (8) the cumulative errors in Petitioner's case warrant habeas relief; (9) the state court proceedings were void *ab initio* because the state court lacked jurisdiction over the crime; and (10) Oklahoma's lethal injection protocol and procedures violate the Eighth Amendment.

IV. STANDARD OF REVIEW

Since Petitioner filed his original petition in May, 2002, this case is governed by the statute as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy,* 521 U.S. 320, 326–327, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997). Pursuant to the AEDPA, this Court is precluded from granting habeas relief on any claim adjudicated on the merits by a state court

> unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court defined "contrary to" as a state-court decision that is "substantially different from the relevant precedent of this Court." *Id.*, at 405, 120 S.Ct. at 1519. A decision can be "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court case law or "if the state court confronts a set of facts that are materially indistinguishable from" a decision of the Supreme Court, but nonetheless arrives at a different result. *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002), citing *Williams v. Taylor*, 529 U.S. at 405–406. Whereas, the "unreasonable application" provision is implicated when "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor,* 529 U.S. at 407. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, — U.S. —, — S.Ct. —, 2007 WL 1387923 (2007). Finally, the Supreme Court has made it clear that a state court is not required to cite Supreme Court caselaw, or even be aware of it, "so long as neither the reasoning nor the

result of the state-court decision contradicts [Supreme Court precedent]." *Early*, 537 U.S. at 8.

V. PETITIONER'S ALLEGED ERRORS

1. Ineffective Assistance of Counsel

Petitioner first claims his trial lawyer failed to investigate, prepare, and present to the jury readily available and compelling mitigating evidence which, if presented, would likely have led to a different sentencing outcome thereby depriving Petitioner of his Sixth, Eighth and Fourteenth Amendment rights. Petitioner first raised this claim in his state court application for post-conviction relief. The Oklahoma Court of Criminal Appeals denied relief, holding Petitioner was not deprived reasonably competent assistance of counsel under prevailing professional norms. *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002). Furthermore, the state appellate court, after viewing affidavits and evidentiary materials submitted in the post-conviction proceeding, said, in accordance with *Williams v. Taylor*, *supra*, there was no "reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented the additional mitigating evidence now identified by Petitioner and explained its significance. *Id.* Respondent asserts nothing presented by Petitioner establishes that the Oklahoma Court of Criminal Appeals decision denying relief on this issue was either contrary to or an unreasonable application of federal law.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the legal standards which apply to claims of ineffective assistance of counsel in a criminal proceeding. First, the Court indicated that the defendant must establish that the representation

was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. In order to establish that counsel's performance was deficient, Petitioner must establish counsel made errors so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must establish that the deficient performance prejudiced the defense. *Id.* Failure to establish either prong of the *Strickland* standard will result in a denial of Petitioner's Sixth Amendment claims. *Id.* at 696.

While ensuring that criminal defendants receive a fair trial, considerable judicial restraint must be exercised. As the Supreme Court cautioned in *Strickland*,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are

> countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689. (citations omitted).

In deciding whether counsel was ineffective, a court must judge the reasonableness of the challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A defendant attacking an attorney's assistance must identify the particular acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment and then the court must determine, in light of all of the circumstances, whether the identified acts were outside the wide range of professionally competent assistance. *Id.* at 690. Courts are free to address the performance and prejudice components in any order and need not address both where a defendant fails to make a sufficient showing of one. *Id.* at 697.

While the failure to present available mitigating evidence is not *per se* ineffective assistance of counsel, reviewing courts must evaluate the reasons for counsel's failure to present mitigating evidence and then decide whether the failure, if due to an attorney's deficient performance, prejudiced the defendant. *Hale v. Gibson*, 227 F.3d 1298, 1314 (10th Cir. 2000) (quoting *Breechen v. Reynolds*, 41 F.3d 1343, 1365–1368 (10th Cir. 1994)). One of counsel's basic obligations is to make the adversarial testing process work. Since this testing process generally cannot function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, the Supreme Court has indicated a defense attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 691. *See also, Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999). A reasonable investigation includes an investigation of the defendant's background for possible mitigating evidence. *Breechen*, 141 F.3d at 1366. In a capital case, this duty is strictly observed. *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997).

In deciding whether Petitioner's trial counsel rendered effective assistance with respect to the second stage of the proceedings, the Oklahoma Court of Criminal Appeals appears to have correctly applied Supreme Court precedent to the facts of this case, focusing on the prejudice prong of *Strickland*. Specifically, the Court said:

> . . . . we must review the mitigating evidence presented in Petitioner's trial, compare it to the mitigation evidence presented in the post-conviction record, and decide if the post-conviction evidence raises "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence.

Murphy v. State, 54 P.3d 556, 562 (Okla. Crim. App. 2002) (citation omitted).

The state court then undertook a thorough review of the mitigating evidence submitted in both stages of the trial and the jury instruction which told the jurors to consider a list of mitigating evidence which had been presented at trial. Next, the state court enumerated the additional "mitigating" evidence which was contained in the post-conviction affidavits. The state court then found that "the post-conviction affidavits and evidentiary materials do not demonstrate a failure by Petitioner's trial counsel to present mitigating evidence of a constitutionally deficient magnitude,

as that in *Williams*." *Id.* at 564. Ultimately, the state court found Petitioner had failed to establish prejudice as a result of counsel's performance. *Id.*

Petitioner argues, however, that the Oklahoma Court of Criminal Appeals decision regarding ineffective assistance of counsel was wrong because "counsel cannot 'strategically' decide to not use information he did not investigate and develop." First Amended Pet., at pp. 18–19. While that critique may be logical syllogistically, contrary to Petitioner's assertions, the affidavit submitted by trial counsel, James Bowen, makes it clear that counsel actively pursued mitigation evidence and after completing a thorough investigation of Petitioner's background, he developed a reasonable trial strategy. *See*, State Post-Conviction Exhibit 14. In fact, counsel's affidavit indicates, prior to trial, counsel personally had several interviews with not only Petitioner's mother and Petitioner in preparation for trial, but also other family members and witnesses.[4] *Id.* at ¶¶ 8 and 9. Although post-conviction counsel was able to obtain affidavits from the defendant's mother and another family member which established abuse of alcohol by Petitioner's mother while she was pregnant with Petitioner, despite numerous conversations with Petitioner's mother prior to trial, Petitioner's mother was not as forthcoming with trial counsel as she was with post-conviction counsel. Rather, Ms. Murphy "always maintained that her use of alcohol was minimal [while she was pregnant with Petitioner.]" *Id.* at ¶ 9. Trial counsel also spoke with other family members and witnesses, but "none ever contradicted Ms. Murphy's assertions."

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[4] *See also*, State Post-Conviction Exhibit 7, ¶ 2 (one of the "mitigating" witnesses admits she was contacted prior to trial and questioned about Petitioner's background).

Id. Further, Petitioner acknowledged to Dr. Sharp that although "both of his parents consumed alcohol, it was his perception that his mother did not having (sic) a drinking problem, but that his father was most probably alcoholic." *See*, Defendant's Jury Trial Exhibit 4. Nonetheless, after Petitioner was evaluated by Dr. Jeanne Russell, counsel pursued this issue further by discussing the "absence of any visible characteristics of Fetal Alcohol Syndrome" with Dr. Russell. *Id.* If counsel had known this information prior to trial, he may have been ineffective for failing to develop and present it to the jury. Nevertheless, counsel cannot be deemed ineffective where potential witnesses, including family members, change their stories after trial. Further, based upon the active investigation counsel conducted, he developed a trial mitigation strategy which entailed presenting to the jury that Petitioner "was a low risk [for] future violence, that he was chemically dependent, and mentally retarded." *See*, State Post-Conviction Exhibit 14 at ¶ 10. Further, counsel indicates he attempted "to focus on Petitioner's mental retardation and not present evidence that would possibly contradict, or call into question the fact that he was mentally retarded." *Id.* at ¶ 11. Moreover, as recognized by the Oklahoma Court of Criminal Appeals, the post-conviction affidavits conflict with each other and with the testimony at trial; they contain information which would have been as aggravating as it was mitigating; and they contain unreliable hearsay statements which would not have been admissible at trial. *See*, *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002). The affidavits certainly would have cast doubt upon evidence portraying Petitioner as mentally retarded. Consequently, failure to introduce this testimony cannot be deemed unreasonable trial strategy.

Petitioner also complains counsel was ineffective in failing to use his low IQ score advantageously, in further developing evidence that Petitioner had organic brain damage, and emphasizing Petitioner was unlike most criminals because he was not psychopathic. Despite Petitioner's assertions, evidence was presented to the jury to show Petitioner had tested in the mildly retarded range, that he potentially had organic brain damage from various head injuries as well as the amounts of alcohol he regularly consumed, and that he was not a psychopath.[5]

Next, Petitioner argues, because counsel tried several death penalty cases in a relatively short period of time, he failed to allocate a reasonable amount of time to investigate Petitioner's life history. In support of this conclusory allegation, Petitioner cites two things. First, Petitioner asserts the ABA Guidelines mandated counsel spend 1800 hours on this case and since counsel tried four death penalty cases within a space of ten calendar months, he could not have allocated a reasonable amount of time to investigate Petitioner's life. The ABA Guidelines cited by Petitioner, however, were not adopted until February 2003, or approximately three years after Petitioner's trial. Further, the ABA Guidelines make it clear that many things other than the number of cases assigned to an attorney would have to be considered in ascertaining a reasonable workload for a given attorney.

Second, Petitioner asserts that trial counsel not only ignored his obligation to allot a reasonable amount of time to Petitioner's case, counsel "did virtually nothing with the time he had." To support this assertion, Petitioner inserts a footnote in his First Amended

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[5] J.T.Tr. Vol. IV, pp. 875–898, 926–934, and Vol. V, pp. 1234–1239, and 1287–1314.

Petition which states, in part: "Trial counsel failed to investigate the scene of the crime" and counsel "did not view the scene of the crime." First Amended Petition at p. 27, footnote 7. No affidavit has ever been submitted to this Court or to the Oklahoma Court of Criminal Appeals to support Petitioner's bald assertions.[6] Additionally, whether or not counsel properly investigated the scene of the crime has absolutely no bearing on Petitioner's assertion that counsel was ineffective in investigating and/or uncovering potentially mitigating evidence. Here, counsel submitted an affidavit detailing actions he took during his investigation of potentially mitigating evidence in this particular case. Petitioner has never raised an ineffective assistance of counsel claim as it relates to the first stage of trial. Nonetheless, all of these attacks on the Oklahoma Court of Criminal Appeals decision are misplaced. The state court did not rest its decision on the first prong of *Strickland*, whether or not counsel was ineffective; but chose instead to focus on the second prong, whether Petitioner was prejudiced by counsel's actions.

Petitioner asserts counsel's failure to properly investigate prejudiced him because he did not have "a good life and raising" as argued by the prosecutor during second stage closing arguments and counsel did not put on evidence to counter these arguments. Despite Petitioner's assertions, the jury heard evidence that Petitioner's childhood was not "good." Specifically, Ms. Murphy testified that Petitioner's father was not around and because of his mixed-race heritage,

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[6] While evidence at a hearing on jurisdiction established the crime scene had been described incorrectly by a witness at trial, neither the witness explaining the discrepancy nor any other witness testified regarding actions taken by trial counsel in preparation for trial. *See*, Evid. Hrg. Tr. Vol. I, at pp. 30–32 and 49–52.

Petitioner had to endure cruel teasing from extended family members. Despite these shortcomings, both Petitioner and his mother testified he was a good child who could be proud of his accomplishments. J.T.Tr., Vol. V, at pp. 1318–1340. *See also,* Second Stage Jury Instruction No. 13, O.R. 413 (enumerates an exhaustive list of evidence which might be considered mitigating).

Furthermore, in assessing prejudice during the second stage, a court should "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003). This Court does not believe that the additional evidence regarding Petitioner's non-idyllic childhood would have outweighed the aggravating circumstances found by the jury of continuing threat and the especially heinous, atrocious and cruel nature of the murder. This is particularly true where, as in this case, (1) significant evidence from an expert was introduced to establish that Petitioner would not be a continuing threat to society were he locked up in a secure facility and prevented from consuming alcohol;[7] and (2) the jury found the crime was especially heinous, atrocious or cruel, based in part, upon Petitioner's own admissions regarding slitting the victim's throat, cutting his stomach, cutting off of his genitalia and then leaving the victim out on a dark road to bleed to death.[8]

To the extent the Oklahoma Court of Criminal Appeals viewed not only the evidence submitted at trial, but also the evidence which could have been submitted, before deciding that Petitioner was not

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[7] J.T.Tr. Vol. V, at pp. 1227–1261.

[8] J.T.Tr. Vol. II, at pp. 343–345 and Vol. III, at pp. 603, 668–669, 709–710; Vol. IV, 1025 and State's Trial Exh. No. 5.

prejudiced by counsel's actions (*i.e.*, there is not "a reasonable probability that the result of the sentencing proceeding would have been different," *Murphy v. State*, 54 P.3d 556, 565 (Okla. Crim. App. 2002)), this Court finds, based upon the record herein, that the Oklahoma court's decision regarding prejudice was not an unreasonable application of Supreme Court precedent to the facts of this case. Accordingly, Petitioner's claim for relief based on ineffective assistance of counsel is denied.

2. Heinous, Atrocious, or Cruel Aggravator

In his second ground for relief, Petitioner argues the evidence was insufficient to support Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance and that the jury instructions surrounding this aggravating circumstance were so deficient that they violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights. Respondent asserts the aggravator is not unconstitutionally infirm and the Oklahoma court's determination that the jury instructions accurately stated the applicable law is not contrary to, nor an unreasonable application of, clearly established federal law.

A. Sufficiency of the Evidence

The United States Supreme Court held, in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), *reh. denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979), in a federal habeas proceeding challenging the sufficiency of the evidence in a state trial, that a reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Further, the Court indicated following conviction, a judicial review of

the "evidence is to be considered in the light most favorable to the prosecution." *Id.* In *Lewis v. Jeffers*, 497 U.S. 764, 782, 110 S.Ct. 3092, 3103, 111 L.Ed.2d 606 (1990), the Court said the principles enunciated in *Jackson* apply with equal force to federal habeas review of a state court's finding of aggravating circumstances.

> Although aggravating circumstances are not "elements of any offense, see *Walton, Id.*, 497 U.S., at 648–649, 110 S.Ct., at 3054–3055, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty. Like findings of fact, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson, supra*, 443 U.S., at 319, 99 S.Ct., at 2789.

Lewis v. Jeffers, 497 U.S. at 782.

As previously indicated, determinations of factual issues by a state court are presumed correct. 28 U.S.C. § 2254(e)(1). "A state court's finding of an aggravating circumstance in a particular case . . . is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783.

Petitioner first raised this issue during his direct appeal. In rejecting the claim on the merits, the Oklahoma Court of Criminal Appeals found:

> The crux of [Petitioner's] argument, . . . , is that the evidence of torture was insufficient because there was "nothing, absolutely nothing, in the record to show that (Jacobs) was consciously aware of the injury being inflicted." (citation omitted).
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> We disagree. [Petitioner] told the police Jacobs was groaning during the attack, and that he was still alive, breathing, and saying "oh" when they left him bleeding by the side of the road. The process of bleeding to death took as little as four minutes, possibly more than twelve. There was testimony that his severed genitals were placed in his mouth at one point, and, if true, the victim may still have been alive after this point, for the genitals were found at a distance from the body. There was also testimony that Jacobs had been in an upright position at one point, for blood was found on the top of his shoes. The medical examiner testified that, although the victim had a blood alcohol content of .23, a normal person would be impaired, but still able to function, at this level.
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> . . . . . Accordingly, we find the evidence admitted at trial, when viewed in a light most favorable to the State, was sufficient to find beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel. (citation omitted)

Murphy v. State, 47 P.3d 876, 883 (Okla. Crim. App. 2002).

Under Oklahoma law, before a jury can find that a murder was especially heinous, atrocious or cruel there must be proof that death was preceded by tor-

ture or serious physical abuse. *Turrentine v. State*, 965 P.2d 955, 976 (Okla. Crim. App. 1998). *See also*, OKLA. STAT. tit. 21, § 701.12(4) (1999). Two kinds of cases have been identified by the Oklahoma Court of Criminal Appeals in which "torture or serious physical abuse" will be found: "those characterized by the infliction of "great physical anguish" and those characterized by the infliction of "extreme mental cruelty." *Thomas v. Gibson*, 218 F.3d 1213, 1226 (10th Cir. 2000) (citing *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995)). In *Spears v. State*, 900 P.2d 431, 443 (Okla. Crim. App. 1995), the court held "[t]o support a finding of serious physical abuse, the State must show the victim endured *conscious* physical suffering prior to death." (emphasis in original) *See also*, *Cheney v. State*, 909 P.2d 74, 81 (Okla. Crim. App. 1995) (Footnote 20 contains a summary of Oklahoma cases requiring conscious suffering to support evidence of heinous, atrocious or cruel aggravating circumstance).

Petitioner asserts there was no evidence to prove beyond a reasonable doubt that the victim was conscious at the time of the murder. Petitioner then recounts only evidence favorable to his assertion. While it is true the victim did not have any defensive wounds,[9] unlike the facts in *Thomas*, the evidence clearly established the victim was groaning during the attack as Petitioner admitted "telling Agent Jones he was alive when we left, breathing, he was saying 'Oh.'"[10] Furthermore, the medical examiner indicated, even with a .23 blood alcohol content, a person would still possess the ability to speak, to function (although impaired), and to feel pain.[11] Although the medical

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[9] *See*, J.T.Tr., Vol. III, at p. 767.
[10] *Id.*, Vol. IV, at p. 1041.
[11] *Id.*, Vol. III, at p. 773.

examiner did not note any defensive wounds, he was unable to say whether or not the victim was unconscious at any particular point in time during the attack, other than saying he would have lapsed into unconsciousness immediately before death.[12] The jury also heard evidence that blood spatter indicated the victim would have been, at least partially, upright during part of the attack and there were blood stains on the top of the victim's shoes.[13] To the extent the medical examiner indicated the process of bleeding to death took at least four to five minutes[14] and Petitioner admitted the victim was saying "oh," this Court finds the determination by the Oklahoma Court of Criminal Appeals that there was sufficient evidence for a jury to determine beyond a reasonable doubt that the victim was conscious during at least part of the attack is not an unreasonable determination of the facts in light of all the evidence heard by the jury. In this Court's opinion, the evidence viewed in the light most favorable to the prosecution overwhelmingly establishes the victim endured conscious physical suffering prior to death sufficient to support the jury's finding that this murder was "heinous, atrocious or cruel." Accordingly, Petitioner has failed to establish, pursuant to 28 U.S.C. § 2254(d)(2), that he is entitled to relief on this issue.

B. Jury Instructions

Next, Petitioner argues the jury instructions were insufficient on the heinous, atrocious or cruel aggravator because they were not particularized to Petitioner's individual conduct. As a general rule, improper jury instructions do not form the basis for federal habeas

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[12] *Id.*, at pp. 774–775.
[13] *Id.*, at pp. 453–454 and 473.
[14] *Id.*, at p. 772.

corpus relief. *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). In attempting to set aside a state conviction based on erroneous jury instructions, a habeas petitioner has a heavy burden. Such errors are ordinarily not reviewable in a federal habeas proceeding, "unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law." *Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997) (citing *Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981)).

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736–37, 52 L.Ed.2d 203 (1977) (footnote omitted). The question in this proceeding is not whether the instruction is "undesirable, erroneous, or even 'universally condemned,'" but whether the instruction so infected the trial that the resulting conviction violates due process. *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155, 94 S.Ct. at 404.

Maes v. Thomas, 46 F.3d 979, 983 (10th Cir. 1995).

First, Petitioner asserts the jury should have been instructed not only whether the "murder" was heinous, atrocious, or cruel but whether Petitioner's individual conduct resulted in a death that was heinous, atrocious, or cruel. Petitioner seems to be arguing that he was not personally tied to the pre-

death torture or serious physical abuse and, therefore, this aggravating circumstance could not be applied to any of his conduct. Based upon the evidence at trial, however, this argument is absurd. Petitioner admitted and bragged to at least three different people about amputating the victim's genitalia, as well as cutting the victim's throat and abdomen and stomping on his head.[15] Further, Petitioner told his cousin after he had cut the victim's "dick and nuts off," that he shoved them in the victim's mouth.[16] Such admissions individually tied Petitioner to the conduct supporting this aggravating circumstance.

Next, Petitioner complains the jury instructions were inadequate because they did not instruct the jury that they had to find the victim had consciously suffered before finding the aggravator applied to the facts of his case. Petitioner's jury was instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." O.R. 404. *See also*, Oklahoma Uniform Jury Instruction 4–73. The jury was further instructed, "[t]he phrase 'especially heinous, atrocious, or cruel' is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse." O.R. 404. The Tenth Circuit Court of Appeals has consistently rejected challenges that this aggravator is unconstitutionally vague and upheld the use of Oklahoma's uniform jury instruction limiting this aggravator to those crimes where the death of the victim was preceded by torture or serious physical abuse of the

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[15] J.T.Tr., Vol. III, at pp. 603, 667–668, 697, 709–711.

[16] *Id.*, at p. 668.

victim. *See Workman v. Mullin*, 342 F.3d 1100, 1115–1116 (10th Cir. 2003) and cases cited therein. The instructions given in Petitioner's case clearly advised the jury that they could not find this aggravating circumstance unless they first determined the victim was tortured or physically abused such that a high degree of pain was inflicted upon him. *See* O.R. 404.

Finally, Petitioner asserts the Oklahoma Court of Criminal Appeals unreasonably applied federal law because *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), required the jury to find the victim "consciously suffered" beyond a reasonable doubt. The necessary finding by the jury, however, was that "the death of the victim was preceded by torture of the victim or serious physical abuse." A finding by the jury of either of these two elements beyond a reasonable doubt was sufficient to support this aggravating circumstance. *See, Turrentine v. State*, 965 P.2d 955, 975 (Okla. Crim. App. 1998). Since the jury necessarily found one or both of these elements prior to finding the aggravator applicable to Petitioner, Petitioner's claim that the Oklahoma Court of Criminal Appeals decision upholding the jury's sentence was contrary to, or an unreasonable application of, clearly established federal law lacks merit. Furthermore, to the extent Petitioner argues he was deprived of his Fourteenth Amendment rights, this Court finds that because Petitioner's jury was properly instructed regarding this aggravating circumstance, Petitioner was not deprived of any constitutional rights. Therefore, Petitioner's claim for relief is denied.

3. Continuing Threat Aggravator[17]

While acknowledging that the Tenth Circuit has repeatedly found Oklahoma's "continuing threat" aggravating circumstance constitutional, Petitioner nonetheless argues, in essence, that this aggravating factor is always unconstitutional because it is so vague and broad that it is a "standardless catchall" and it was unconstitutionally applied to his case in violation of his Sixth, Eighth, and Fourteenth Amendment rights. Further, Petitioner asserts the Oklahoma Court of Criminal Appeals' interpretation of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) is unreasonable as applied to this case. Respondent counters that the Oklahoma Court's rejection of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law. Thus, Respondent urges this Court, pursuant to 28 U.S.C. § 2254(d)(1), to defer to the Oklahoma Court's decision.

In *Jurek*, the Court upheld the use of the language "continuing threat to society" where the jury was allowed to consider any mitigating circumstances offered by the defendant. *See also Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255 (1990). Notwithstanding the severity of the crime or a defendant's potential to commit similar crimes in

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[17] Oklahoma's "continuing threat" aggravating factor authorizes the imposition of the death penalty if the jury finds "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." OKLA. STAT. tit. 21, § 701.12(7).

the future, ". . . sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, . . ." *Abdul-Kabir v. Quarterman*, — U.S. —, 127 S.Ct. 1654 (2007). *See also, Brewer v. Quarterman*, — U.S. —, 127 S.Ct. 1706 (2007) and *Smith v. Texas*, — U.S. —, 127 S.Ct. 1686 (2007).

While Oklahoma's capital-sentencing system differs in some major aspects from the one upheld in *Jurek*, the use of the "continuing threat" language as an aggravator which would limit those upon whom the death penalty may be imposed is quite similar. First, an Oklahoma jury must find that the aggravating circumstances outweigh the mitigating circumstances before it is authorized to consider the death penalty. OKLA. STAT. tit. 21, § 701.11. In order to convince a jury that the death penalty should not be imposed, a defendant has the right to present "any relevant evidence . . . bearing on his character, prior record or the circumstances of the offense." *Chaney v. State*, 612 P.2d 269, 279–280 (Okla. Crim. App. 1980) (construing OKLA. STAT. tit. 21, § 701.10 which governs sentencing proceedings in a first degree murder case). The jury, in this case, was so instructed.[18] As a result, this Court finds Petitioner's jury received sufficient guidance to enable it to make an informed decision regarding whether or not the death penalty was the appropriate punishment. The Oklahoma Court of Criminal Appeals' decision rejecting each of Petitioner's claims is neither contrary to, nor an unreasonable application of *Jurek* to the facts of this case.

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[18] *See* Jury Instruction Nos. 3–6 and 10–15, O.R. 403–406 and 410–415, respectively.

Furthermore, the Tenth Circuit Court of Appeals has consistently held the continuing threat factor used in Oklahoma's statutory sentencing scheme is constitutional. *Nguyen v. Reynolds*, 131 F.3d 1340, 1352–54 (10th Cir. 1997), *cert. denied*, 525 U.S. 852, 119 S.Ct. 128, 142 L.Ed.2d 103 (1998). *See also*, *Ross v. Ward*, 165 F.3d 793, 800 (10th Cir. 1999) (citing *Castro v. Ward*, 138 F.3d 810, 816 (10th Cir.), *cert. denied*, 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998) and *Nguyen*) and *Fowler v. Ward*, 200 F.3d 1302, 1313 (10th Cir. 2000), *cert. denied*, 531 U.S. 932, 121 S.Ct. 317, 148 L.Ed.2d 254 (2000). Since Petitioner has cited no new authority or compelling arguments, this Court finds this claim is unpersuasive. Accordingly, it is denied.

4. Jury Instructions Re: Balancing Aggravating and Mitigating Factors

Issues regarding whether a jury was properly instructed are questions of law. *United States v. Voss*, 82 F.3d 1521 (10th Cir. 1996). Accordingly, in order to grant relief on this issue, the decision of the Oklahoma Court of Criminal Appeals must be "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

Petitioner admits the jury was properly instructed that, in the event they found the aggravating factors outweighed the mitigating circumstances, they could consider the sentence of death.[19] Petitioner argues, however, that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), required the jury to also be instructed that aggravating factors must outweigh mitigating factors

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[19] *See* Jury Instruction Nos. 10 and 14, O.R. 410 and 414, respectively.

beyond a reasonable doubt. Since the jury was not so instructed, Petitioner asserts his Sixth, Eighth and Fourteenth Amendment due process rights were violated. In considering this claim during post-conviction proceedings, the Oklahoma Court of Criminal Appeals held:

> On numerous occasions, prior to *Apprendi*, when criminal defendants have presented similar arguments to the one Petitioner raises here, this Court has stated its firm position that "specific standards for balancing aggravating and mitigating circumstances are not required" under Oklahoma's capital sentencing scheme. (citations omitted) Our position on this point has not changed as a result of the *Apprendi* decision, for the reasons set forth below.
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> First, *Apprendi* was a five to four, non-capital decision that resulted in five separate opinions from the Supreme Court justices on distinguishable facts. Second, *Apprendi's* language does not, in our opinion, extend so broadly as to require a jury to find aggravating circumstances which have already been found by a jury to exist beyond a reasonable doubt, outweighed the mitigating circumstances beyond a reasonable doubt. Third, the United States Supreme Court's recent decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), while apparently extending *Apprendi's* holding to capital sentencing schemes, sheds no further light on the precise issue here. (footnote omitted) Fourth, under Oklahoma's capital sentencing scheme, jurors are required to unanimously find statutory aggravating cir-

> cumstances exist beyond a reasonable doubt, before the death penalty can be considered. At that point, the death penalty is in fact the maximum penalty, and the jury is simply deciding which of the three available punishments is proper, so long as aggravating circumstances outweigh mitigating circumstances.

Murphy v. State, 54 P.3d 556, 566 (Okla. Crim. App. 2002).

In *Kansas v. Marsh*, — U.S. —, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), the Supreme Court indicated as long as the state is required to prove aggravating circumstances beyond a reasonable doubt before a defendant is considered death-eligible, the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighted." Accordingly, Petitioner has failed to establish that the Oklahoma Court's adjudication of this claim was contrary to or an unreasonable application of relevant Supreme Court precedent. Petitioner is, therefore, not entitled to habeas relief on this issue.

5. Victim Impact Evidence

In his fifth ground for relief, Petitioner asserts the victim impact evidence which explicitly called for his execution exceeded what is constitutionally permissible and violated his rights to a fundamentally fair sentencing proceeding as guaranteed by the Fifth, Eighth and Fourteenth Amendments. Petitioner raised this issue during direct appeal, and the Oklahoma Court of Criminal Appeals adjudicated the issue on the merits. Although Petitioner objected to specific comments contained within the victim impact statements immediately before the second stage proceedings

began, he did not reurge his objections when the statements were actually read in court. As a result, the Oklahoma Court of Criminal Appeals held Petitioner had waived all but plain error. *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002). Petitioner now asserts the Oklahoma Court of Criminal Appeals' "finding that trial counsel did not make a 'contemporaneous' objection strains credulity and is clearly unreasonable." First Amended Pet., at p. 70. Thus, Petitioner claims this Court is "free to depart from the OCCA's factual analysis of the claim." *Id.*

It is well-settled, however, that the contemporaneous objection rule is an independent and adequate state procedural ground. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Where a state court declines to address a claim based upon a state procedural requirement, the state court judgment is considered to rest on independent and adequate state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729–730, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991), citing *Wainwright v. Sykes, supra*. Therefore, Respondent asserts the Oklahoma court's determination that Petitioner's failure to follow the state's contemporaneous objection rule waived review for all but plain error does not give this Court the right to review *de novo* Petitioner's victim impact claims.

Even though the Oklahoma Court of Appeals held Petitioner had waived all but plain error, it nonetheless considered all of the alleged errors in the victim impact statements in light of the principles enunciated in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). As a result, the issue before this Court is whether the decision of the Oklahoma Court of Criminal Appeals was contrary to, or an unreasonable application of clearly established federal

law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

The issue of victim impact evidence has been squarely addressed by the Supreme Court on several occasions. First, in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the Court in a 5-to-4 decision held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was per se inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." Thereafter, in *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court extended *Booth* to include prosecutorial statements to the sentencing jury regarding the personal qualities of the victim.

Later, in *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the Court overruled *Booth* and *Gathers* holding:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

See also, *Jones v. United States*, 527 U.S. 373, 395, 119 S.Ct. 2090, 2105, 144 L.Ed.2d 370 (1999)(Eighth Amendment allows a capital sentencing jury to con-

sider evidence of victim's personal characteristics and the emotional impact of the murder on the victim's family.) If, however, the evidence introduced is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne* 501 U.S. at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183, 106 S.Ct. 2464, 2470–2473, 91 L.Ed.2d 144 (1986)). As stated in *Darden*, the question a reviewing court must consider is whether the evidence introduced "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)).

The Oklahoma Court of Criminal Appeals decision specifically discussed these relevant Supreme Court decisions holding:

> . . . . . [Petitioner] claims the victim impact evidence admitted in his trial exceed (sic) what is constitutionally permissible, i.e., it "characterized the offense, the perpetrator, and recommended the punishment", and thus deprived him of a fair trial and due process under the United States Constitution and the Supreme Court decisions in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) and *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). He claims Oklahoma's governing statute, 22 O.S.Supp. 1998, § 984(1) and this Court's interpretation thereof are unconstitutional. He also claims the statements were far more prejudicial than probative and that they contained hearsay and conjecture components.

[Petitioner] specifically complains of the following from the written, but brief, victim impact statements that were read to jurors. First, the victim's brother Rueban stated he could not understand why [Petitioner] would want to kill his brother and that [Petitioner] "should get the death penalty for taking an innocent life. I pray that he will not ever get out of jail and do bragging." Second, the victim's brother Frank stated, "I believe in the Bible. I believe an eye for any (sic) eye and that they should be put to death." Third, the victim's sister Irene's statement commented on her anger at the "way (George) was murdered" and took the position that her brother "had a right to be here and alive today." Irene also stated, "I hope you see that no one in the world should ever be free who committed such a crime." Fourth, the victim's sister Nadine stated, "I just hope and pray that these killers get the most severe punishment. There is no mercy for them." [Petitioner] claims these statements amounted to super-aggravators.

[Petitioner] did not object to the statements when they were read in court, thus waiving all but plain error. *Miller v. State*, 2001 OK CR 17, ¶ 36, 29 P.3d 1077, 1085. We find no plain error occurred.

In at least three decisions, this Court has taken the position that *Payne* appears to have overruled *Booth* with respect to the issue of whether or not victim impact statements could include characterizations of the defendant, the crime, and opinions in regard to sentencing. *See, e.g., Turrentine v. State*, 1998

OK CR 33, ¶ 94, 965 P.2d 955, 980, *cert. denied*, 525 U.S. 1057, 119 S.Ct. 624, 142 L.Ed.2d 562 (1998) (finding characterizations and opinions about the crime, the defendant, and the appropriate punishment no longer barred by Supreme Court); *Ledbetter v. State*, 1997 OK CR 5, ¶ 27, 933)P.2d 880, 890–91 (*Booth's* Eighth Amendment prohibition against such evidence has been apparently overruled by *Payne*); *Conover v. State*, 1997 OK CR 6, ¶ 60, 933 P.2d 904, 920 (*Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence.").

We note here, however, that in footnote two of *Payne's* majority opinion and in Justice O'Connor's concurring opinion, the Supreme Court left open the question about admissibility of victim impact evidence regarding characterizations and opinions about the crime, the defendant, and the appropriate sentence because no such evidence was presented in that case. *Payne*, 501 U.S. at 830, 833, 111 S.Ct. at 2611–13.

Nevertheless, we note the Supreme Court has denied certiorari in *Turrentine*, and since that time, we have continued to approve of such evidence in other capital cases. *See Young v. State*, 2000 OK CR 17, ¶ 83, 12 P.3d 20, *cert. denied*, 532 U.S. 1055, 121 S.Ct. 2200, 149 L.Ed.2d 1030 (2001) ("victim impact witness' opinion as to the appropriateness of the death penalty is admissible, but is limited to the simple statement of the recommended sentence without amplification."); *Welch v. State*, 2000 OK CR 8, ¶ 40, 2 P.2d 356, 373,

cert. denied, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000) ("victim impact testimony may include information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence."). We therefore reject [Petitioner's] contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional.

Furthermore, we find no plain error in the admission of the victim impact statements in question. While the brief testimony from the victim's brother—regarding his belief in the Bible and an "eye for an eye"—was an inappropriate overamplification that should have been stricken, taken as a whole, the testimony was within the bounds of admissible evidence, and its focus did not have such a prejudicial effect or so skew the presentation to divert the jury from its duty to reach a reasoned moral decision on whether to impose the death penalty. *Short v. State*, 1999 OK CR 15, ¶ 59, 980 P.2d 1081, 1101, *cert. denied*, 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000). The *Cargle v. State*, 1995 OK CR 77, 909 P.2d 806 instruction was given, thereby insuring jurors understood the proper weight to give such evidence, including any that was borderline or that crossed over the line.

Accordingly, we find the victim impact evidence was not "so unduly prejudicial that it render(ed) the trial fundamentally unfair." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. We further find the evidence did not act as a super-aggravator, nor do we find any support

> for [Petitioner's] bare claim that the statements "contain hearsay and conjecture components."

Murphy v. State, 47 P.3d 876, 884–886 (Okla. Crim. App. 2002) (footnotes omitted).

Even though the challenged evidence was admitted pursuant to 22 O.S. § 984(1),[20] Petitioner argues the Oklahoma Court of Criminal Appeals' assertion that *Payne* had overruled *Booth* in its entirety is contrary to, or an unreasonable application of, clearly established Supreme Court law. In support of his argument, Petitioner cites the Tenth Circuit's opinion in *Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002), which expressly held "that the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." Respondent, on the other hand, argues the Tenth Circuit's decision in *Hain* does not constitute "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Where the Supreme Court has not definitively ruled on a specific issue, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." *Carey v. Musladin*, — U.S. —, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). The Supreme Court has, on

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[20] This statute provides: "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, *and the victim's opinion of a recommended sentence*; . . ." (Emphasis added).

numerous occasions, discussed what can be considered "clearly established Federal law" relevant to death penalty cases. Some of those discussions were summarized in *Booth*, when the Court stated:

> It is well settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *California v. Ramos*, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. See, *e.g.*, *id.*, at 1000–1001, 103 S.Ct. at 3452–3453. Specifically, we have said that a jury must make an "*individualized* determination" whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983) (emphasis in original). See also *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982). And while this Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." *Enmund v.*

> *Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982). To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See *Zant v. Stephens*, *supra*, 462 U.S. at 885, 103 S.Ct. at 2747.

Booth, 482 U.S. at 502.

In *Payne* the Court made a special effort to acknowledge that the portion of the *Booth* decision which "held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" was not before the Court.[21] As a result, at least five circuit courts have expressly recognized that this portion of *Booth* survived the holding in *Payne* and remains valid. *See United States v. Brown*, 441 F.3d 1330, 1352 (11th Cir. 2006); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999); *Hain v. Gibson*, 287 F.3d 1224, 1238–39 (10th Cir. 2002); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998); and *Woods v. Johnson*, 75 F.3d 1017, 1038 (5th Cir. 1996).

Looking at Petitioner's arguments, it is clear that some of the victim impact testimony fell within the parameters authorized in *Payne*; but other portions of the testimony were improperly admitted. As can be seen from the recitation of the testimony by the Oklahoma Court of Criminal Appeals, *supra*, all four of the second-stage witnesses presented by the prosecution made remarks that they thought Petitioner should get "the death penalty" or should "never be free

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[21] *See, Payne*, 501 U.S. at 830, 111 S.Ct. at 2611, n. 2.

to commit such a crime" or should "just get the most severe punishment."[22] Additionally, in the state's final closing argument, the prosecutor again re-emphasized portions of what each victim had told the jury, including that two of the family members thought the Petitioner should get death.[23] Since the testimony clearly exceeded the personal characteristics of the victim and the emotional impact of the crimes on the family, this Court finds the Oklahoma Court of Criminal Appeals decision is contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Therefore, this Court must decide two issues. First, in looking at the testimony which should not have been admitted, was the constitutional error resulting from the admission of the improper portions of the victim impact statements harmless beyond a reasonable doubt? *Welch v. Sirmons*, 451 F.3d 675, 703–704 (10th Cir. 2006) and cases cited therein. Second, was the overall victim impact evidence so unduly prejudicial that it rendered Petitioner's trial fundamentally unfair? *Payne, supra*, 501 U.S. at 825, 111 S.Ct. at 2597.

After carefully examining the trial transcript, this Court concludes any error was harmless, in that the objectionable portion of the victim impact evidence did not have a substantial and injurious effect or influence in determining the jury's recommended death sentence. Furthermore, when the overall victim impact evidence is considered in conjunction with all of the evidence introduced in both the first and second stages of Petitioner's trial, this Court agrees with the Oklahoma Court of Criminal Appeals' conclusion that this evi-

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[22] J.T.Tr., Vol. V, at pp. 1219–1225.

[23] J.T.Tr., Vol. V, at pp. 1398.

dence was not so unduly prejudicial that it rendered Petitioner's trial fundamentally unfair. Specifically, the prosecution alleged, and the jury found, the existence of two aggravating factors, both of which were amply supported by the evidence. In light of the jury's finding that the murder was especially heinous, atrocious, or cruel and that Petitioner posed a continuing threat to society, this Court finds that the improper aspects of the victim impact evidence simply did not play and could not have played a substantial role in the jury's assessment of the death penalty in this particular case. Further, the overall length of the victim impact testimony relative to the length of the entire trial and the fact Petitioner offered four witnesses after the objectionable portion of the testimony, convinces this Court that the evidence did not infect the trial with unfairness such that the resulting conviction was a denial of due process. *Darden*. Accordingly, Petitioner's claim for relief is denied.

6. Failure to Define Life Without Parole

Relying on *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), Petitioner's sixth ground for relief alleges that failure to define the sentencing option of "life without parole" where the jury was asked to consider future dangerousness deprived him of due process of law and the right to a fundamentally fair sentencing proceeding in violation of the Fifth, Eighth, and Fourteenth Amendments. Respondent again asserts the Oklahoma Court of Criminal Appeals' decision is neither contrary to nor an unreasonable determination of clearly established federal law.

In *Simmons*, the Supreme Court held where the State argues in a capital sentencing proceeding that the petitioner presents a future threat, due process

requires that he be permitted to inform the jury that he is parole ineligible. In this case, the jury was given three discrete sentencing options when the trial court instructed them as follows:

> The defendant in this case has been found guilty by you, the jury, of the offense of murder in the first degree. It is now your duty to determine the penalty to be imposed for this offense.
>
> Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by death, or imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

O.R. 401, Second Stage Jury Instruction No. 1. The Tenth Circuit has consistently held that instructing on these three options, without any additional explanation, satisfies *Simmons*. *Johnson v. Gibson*, 254 F.3d 1155, 1165 (10th Cir. 2001), *cert. denied*, 534 U.S. 1029, 122 S.Ct. 566, 151 L.Ed.2d 439 (2001) (citing *Mayes v. Gibson*, 210 F.3d 1284, 1294 (10th Cir. 2000)).

As can be gleaned from the summary of Petitioner's arguments by the Oklahoma appellate court and the ruling thereon, it is clear that Petitioner's jury received more information than is constitutionally mandated or has ever been required by controlling Supreme Court precedent. Specifically, the Oklahoma Court of Criminal Appeals summarized Petitioner's arguments before the trial court and on appeal as follows:

> . . . . . [Petitioner] claims the trial court's failure to define life without parole denied him due process of law and a fundamentally

fair trial. To support this proposition, [Petitioner] points to a motion he filed prior to trial in which he requested the trial court to allow testimony or "evidence" regarding "the effects and conditions of a sentence of life without the possibility of parole."

Contrary to [Petitioner's] claim, this motion was not a request for the trial court to provide the jury with instructions regarding the actual meaning of life without parole. Rather, it was a request to produce *evidence* to the jury during the second stage regarding distinctions between the sentencing options, relief available from the Department of Corrections, and the conditions and restrictions associated with a sentence of life without parole.

Be that as it may, the motion was not denied, as [Petitioner] suggests. Rather, the trial judge ruled he would allow argument regarding this issue, but no evidence. (O.R. at 192). The trial judge specifically stated defense counsel could write the words "life without parole" for jurors during arguments, and underline the words "without parole." He also allowed defense counsel to tell jurors that "life without parole means life without parole." Defense counsel went even further than this, telling jurors that they had the option of "putting him in prison for the rest of his life . . . don't give him the possibility of parole."

This is not a case where a specific instruction was requested and refused, nor is it a case where the jury sent back a note asking for additional information on what life

> without parole means. Indeed, this is a case where jurors were told, essentially, that life without parole means what it says.
>
> Moreover, this Court has, in numerous instances, stated that the meaning of life without parole is self-explanatory and that an instruction on its meaning is not required. *Powell v. State*, 2000 OK CR 5, ¶ 127, 995 P.2d 510, 536, *cert. denied*, 531 U.S. 935, 121 S.Ct. 321, 148 L.Ed.2d 258 (2000); *Howell v. State*, 1998 OK CR 53, ¶ 8, 967 P.2d 1221, 1225, *cert. denied*, 528 U.S. 834, 120 S.Ct. 93, 145 L.Ed.2d 79 (1999); *McCracken v. State*, 1994 OK CR 68, ¶ 49, 887 P.2d 323, 334, *cert. denied*, 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995). Accordingly, we find [Petitioner] was not denied due process or a fundamentally fair trial when the trial judge allowed even more information on this issue than is currently required.

Murphy v. State, 47 P.3rd 876, 886 (Okla. Crim. App. 2002). After reviewing the record below, this Court finds the decision of the Oklahoma Court of Criminal Appeals on this issue was not an unreasonable determination of clearly established federal law as determined by the Supreme Court of the United States. Thus, Petitioner is not, pursuant to 28 U.S.C. § 2254(d), entitled to relief on this issue.

7. Admission of Petitioner's Post-arrest Statements

In his seventh ground for relief, Petitioner asserts the state court improperly denied his request to suppress his post-arrest statements to police because the statements were neither voluntarily or knowingly given. Petitioner argues, under the totality of the facts,

his post-arrest waiver of his right to counsel was not the product of a rational intellect and a free will as required by *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).[24] Respondent asserts this claim lacks merit and that the Oklahoma Court of Criminal Appeals' determination that Petitioner's statement was properly admitted is not based on an unreasonable assessment of the facts from the record nor contrary to, or an unreasonable application of, clearly established federal law.

Without question, Petitioner was entitled to the rights recognized by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which imposed upon the police a duty, prior to the initiation of questioning, to "fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to 'have counsel present . . . if [he] so desires.'" *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986) (quoting *Miranda*, 384 U.S. at 468–470, 86 S.Ct. at 1624–1626). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Miranda*, 384 U.S. at 473–474, 86 S.Ct. at 1627. *See also, Edwards v. Arizona*, 451 U.S 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A suspect may, however, waive his *Miranda* rights so long as the waiver is "made voluntarily, knowingly and intelligently." *Moran*, 475 U.S. at 421, 106 S.Ct. at 1141. An inquiry into whether an accused effectively waived his right to counsel, involves two distinct inquiries.

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[24] This is the only authority Petitioner cites in support of this ground for relief.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). Finally, in *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994), the Supreme Court stated:

> . . . if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . . Rather, the suspect must unambiguously request counsel.

In this case, Petitioner argues not that he was intimidated, coerced or deceived into waiving his rights, but that he was "confused about his rights." First Amended Pet. at p. 78. Respondent argues Petitioner did not unequivocally request an attorney. Combined Response at p. 34. Respondent further argues Petitioner has failed to show that the Court of Criminal Appeals' decision involved an unreasonable application of the law to the facts. *Id.* at p. 36.

In considering Petitioner's claim on the merits, the Oklahoma Court of Criminal Appeals made the following factual determinations:

> . . . . .[Petitioner] claims a custodial statement he gave after his arrest violated his right to counsel. He claims the statement should have been suppressed, and the trial court erred by admitting it at trial, following the *Jackson v. Denno* hearing held on its admissibility. In that hearing, the trial judge found [Petitioner] voluntarily and knowingly waived his right to counsel.
>
> [Petitioner] specifically points to transcript excerpts of his interrogation in which he seemed to have been confused about whether or not he was entitled to an attorney, whether or not he was going to ask for an attorney, and whether or not he could speak to the officers with an attorney present.
>
> For example, after receiving the *Miranda* warning and being asked if he desired to speak to police officers, [Petitioner] stated, "Well, I can't answer that right now. I don't know this, this I'm not for sure if I'm gonna have an attorney." The police then told [Petitioner], "It is your right to have an attorney. Do you want one or do you want to talk to us? It's your choice. Do you want an attorney yes or no?" [Petitioner] asked, "Well, can I still talk to ya'll and still have an attorney present?" The officers responded, "Do you want, you want an attorney? You can have an attorney. If not, you can talk to us right now. It's your choice. I can't tell you what to do." [Petitioner] replied, "I mean, I mean, your (sic) saying I can't do both?" The

> officer said, "Yeah. Eventually sure. If you want an attorney, we'll get you an attorney. If that's what your (sic) saying."
>
> Similar exchanges continued until [Petitioner] eventually agreed to talk to the police without an attorney present. He then signed a waiver to that effect.

Murphy v. State, 47 P.3d 876, 881 (Okla. Crim. App. 2002). Petitioner has not shown, by clear and convincing evidence, that these factual determinations are incorrect. Therefore, this Court must presume the factual determinations to be correct. 28 U.S.C. § 2254(e)(1).

The appellate court then applied the principles enunciated by the Supreme Court in *Davis, supra*, to determine whether or not Petitioner had unambiguously requested counsel, holding:

> We see no violation of [Petitioner's] constitutional right to counsel from these transcripts or from the testimony given at the *Jackson v. Denno* hearing. Like *Dennis v. State*, 1999 OK CR 23, 990 P.2d 277, [Petitioner's] proposition rests entirely on his ability to get this Court to agree that his vague and noncommittal statements to police officers somehow invoked his right to counsel. However, we find his statements do "not even reach the level of an ambiguous request for counsel, and of course, police are not required to stop questioning when faced with an ambiguous request." *Dennis*, 1999 OK Cr 23, ¶ 6, 990 P.2d at 279–80 (construing *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994)).

Murphy v. State, 47 P.3d 876, 881–882 (Okla. Crim. App. 2002).

This Court finds the Oklahoma Court of Criminal Appeals applied the correct legal standards enunciated by the Supreme Court in *Davis*. Based upon the state court's application of the proper legal standard to the facts of this case, this Court finds Petitioner has failed to establish that he is entitled to relief on this issue, pursuant to 28 U.S.C. § 2254(d).

8. State Court Jurisdiction

Petitioner argues in his Second Amended Petition (Dkt. No. 54) the State of Oklahoma lacked jurisdiction to try him for murder because both he and the victim are Indian and his crime occurred in "Indian country." Thus, Petitioner asserts jurisdiction over the crime rested exclusively in the federal government pursuant to 18 U.S.C. § 1153. Petitioner first raised this issue in his Original Petition for Writ of Habeas Corpus filed herein on March 5, 2004. Dkt. No. 14, at p. 18. At the time of filing his original petition, however, Petitioner recognized that the claim had not been presented to the state court, but advised the Court since jurisdiction presented a federal question, it should never be subjected to procedural bar. Subsequent to the filing of his Petition in this Court, on March 29, 2004, Petitioner filed a second or subsequent application for post-conviction relief in the Oklahoma Court of Criminal Appeals. *Murphy v. State*, Case No. PCD-2004-321. On August 30, 2004, this Court entered an order, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), "that the petition [would] be dismissed on September 13, 2004 unless, prior to that time, the petition [was] amended to drop all unexhausted claims" (Dkt. No. 27). Thereafter, on September 10,

2004, Petitioner filed his First Amended Petition which omitted this particular claim (Dkt. No. 33).

In the second post-conviction proceeding, the Oklahoma Court of Criminal Appeals granted an evidentiary hearing which was held in the state district court on November 18, 2004. Thereafter, on December 7, 2005, the Oklahoma Court of Criminal Appeals denied relief on Petitioner's challenge to jurisdiction, finding Petitioner did not commit his crime in Indian country, and therefore, the State of Oklahoma had properly exercised jurisdiction over Petitioner. *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005), *cert. denied*, — S.Ct. —, 2007 W.L. 1582962 (2007). Petitioner claims the Oklahoma appellate court's decision is clearly contrary to and/or an unreasonable application of federal law to the facts of the case. Respondent, on the other hand, argues the decision was neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court.

Petitioner admits, following the evidentiary hearing in state court and the Oklahoma Court of Criminal Appeals' adjudication of this issue, there are no relevant facts in dispute. Accordingly, this Court's consideration of the legal issues involved herein are based upon the following findings of fact of the Oklahoma Court of Criminal Appeals:

> The record reflects Petitioner is an enrolled member of the Muscogee (Creek) Nation, as was the victim, George Jacobs. Both are "Indians" for purpose (sic) of 18 U.S.C. § 1153, as both sides readily admit.

Murphy v. State, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005) (footnote omitted).

> We readily accept the District Court's findings as to the source of the fatal wound and where it was inflicted. For jurisdictional purposes, the crime took place on both the northbound lane of Vernon Road (i.e., the road's eastern side in the N/2 SW/4 and the S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County) and the adjacent ditch. Plus, as the parties and District Court agree, both sites (the site of the fatal wound and the ditch where George Jacobs died) are within the boundaries of the three-rod (49.5 feet) area created along the section line by a 1902 Creek Nation Treaty with the United States. *See* Act of June 30, 1902, 32 Stat. 500, 502, § 10.
>
> .....We find the record, witness testimony, treaty language, and relevant cases all support a finding that the State of Oklahoma's interest in the area in question is in the nature of an easement or right-of-way.

Id. at 1202.

> .....In the instant case, the record shows the crime occurred on land originally allotted to Lizzie Smith, a member of the Creek Nation. However, all surface rights to the property have since been conveyed away to non-Indians. Thus, non-Indians own the actual physical property upon which the crime occurred, ...
>
> However, not all of the fee interest in the original allotment has been conveyed to non-Indians. According to the evidentiary hearing record, while non-Indians own the surface and eleven twelfths of the minerals in the tract where the crime occurred, one twelfth of

the mineral interest remains restricted with the Indian heirs of Lizzie Smith.

Id. at 1204.

George Jacobs was murdered in McIntosh County in August of 1999. The crime occurred on a county section line road in a remarkably rural, heavily treed location, without any sort of improvement noticeable in the photographs, except perhaps a rickety barbed wire fence. The crime occurred approximately one mile north of the small town of Vernon, a town supposedly established by freed black slaves, and four or so miles from the equally small town of Hanna.

Authorities investigated the matter during the relevant time period. As a result state murder charges and a bill of particulars were filed against Petitioner. Trial was held in April of 2000, and Petitioner was convicted of First Degree Murder. Since then the matter has been continuously on appeal.

. . . . .federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.

This case presents two separate and distinct estates in land, i.e., a surface estate and a mineral estate, each subject to being severed and separately conveyed. The uncontradicted evidence shows that the surface estate was separated from the mineral estate on the land where the crime occurred. Also, the uncontradicted evidence shows that, as to

> the surface estate, the Indian allotment had been extinguished by conveyances to non-Indian landowners prior to the time of the crime.
>
> Even as to the remaining Indian allotment mineral estate, the uncontradicted evidence was that all but 1/12th had been extinguished by conveyances to non-Indians.

Id. at 1206.

Petitioner asserts the decision of the Oklahoma Court of Criminal Appeals is clearly contrary to and/or unreasonably applied federal law because the crime scene is "Indian country." Petitioner asserts the land is "Indian country" under two separate theories. First, Petitioner argues the crime scene is a restricted Indian allotment in which all Indian right and title has never been extinguished. Second, Petitioner alleges the crime scene falls entirely within the historical territorial boundaries of the Muscogee (Creek) Nation and, thus qualifies as "land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Respondent asserts the Oklahoma Court of Criminal Appeals' decision that Petitioner's crime was not committed in "Indian country" for purposes of the Indian Major Crimes Act is neither contrary to, nor an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

At the outset, this Court would note that Oklahoma exercised jurisdiction over all of the lands of the former Five Civilized Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) found a small tract of tribally-owned

treaty land existed along the Arkansas River in Tulsa County, Oklahoma. *See, Marlin v. Lewallen*, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 467 (1928) (detailing history of the Creek Nation and the treaties and/or congressional enactments applicable to Creek lands, recognizing "tribal courts were abolished" and a "body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons, except as they might be inapplicable in particular situations or might be superseded as to any of the Five Civilized Tribes by future agreements."); *Ex Parte Nowabbi*, 61 P.2d 1139 (Okl. Crim. App. 1936); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602, 63 S.Ct. 1284, 1286, 87 L.Ed. 1612 (1943) (Court distinguished the treatment of five-civilized tribes from treatment of other Indian tribes observing, "*Worcester v. Georgia*, 6 Pet 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status – *a condition which has not existed for many years in the State of Oklahoma.*" (emphasis added)); and *United States v. Hester*, 137 F.2d 145, 147 (10th Cir. 1943) ("Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws.") Thereafter, because no Supreme Court case had ever addressed the issue of jurisdiction as it relates to lands within the former "Indian territory," the Oklahoma Courts began to reverse criminal cases involving jurisdictional controversies holding "Indian country" jurisdiction was not precluded in what was "Indian Territory" before statehood. *See, State v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (overruling *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla.

Crim. App. 1936) and holding State of Oklahoma never assumed criminal and civil jurisdiction over any "Indian country" within its borders)[25] and *Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992).

Title 18 U.S.C. § 1151 defines "Indian country,"[26] in relevant part, as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, ... and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In *Worcester v. Georgia*, 31 U.S. 515, 520, 6 Pet. 515, 8 L.Ed. 483 (1832), the Supreme Court, in effect, defined an Indian reservation as "a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force. . ." While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years. *See*, Oklahoma

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[25] Since historically Oklahoma exercised civil and criminal jurisdiction over all lands within the former "Indian territory," despite what the Oklahoma Court of Criminal Appeals said in *Klindt*, it could be argued that Oklahoma had, in fact, assumed jurisdiction prior to the enactment of 67 Stat. 588, one of the statutes relied upon by the Oklahoma Court of Criminal Appeals to overturn *Ex parte Nowabbi*, and thus, no further action was required to maintain jurisdiction.

[26] This statute was first enacted on June 25, 1948. 62 Stat. 757.

Enabling Act, 34 Stat. 267 and other cases cited herein. *See also, City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215, 125 S.Ct. 1478, 1490, 161 L.Ed.2d 386 (2005) (acknowledging "jurisdictional history" and the fact that "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" are proper considerations in determining Indian issues.) Further, even Petitioner's expert witness admitted "[t]here was never a formal Creek Nation 'reservation' . . . . ." *Murphy v. State*, 124 P.3d 1198, 1207 (Okla. Crim. App. 2005).

Petitioner argues, however, that the crime scene falls entirely within the historical boundaries of the Muscogee (Creek) Nation and thus falls within the "Indian reservation" prong of the definition of "Indian country" because the Muskogee (Creek) Nation has never been disestablished. *See*, Second Amended Pet. at p. 22. Petitioner cites numerous Supreme Court cases dealing with general principles of Indian law. Petitioner does not, however, attempt to explain how the Supreme Court's recognition that the Five Civilized Tribes have always been treated differently than other Indian tribes affects the application of these general principals of Indian law. *See Worcester v. Georgia*, *supra*. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 603, 63 S.Ct. 1284, 1286, 87 L.Ed.1612 (1943), the Supreme Court recognized that the underlying principles of Indian law applicable in tax cases "do not fit the situation of the Oklahoma Indians."

While Petitioner is correct that the question of disestablishment "turns on the facts and circumstances under which the treaties between the Creek Nation and the United States were signed," Second Amended Pet. At p. 23, another important consideration is the subsequent treatment of the lands. *See*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343–344, 118 S.Ct. 789, 798, 139 L.Ed.2d 773 (1998); *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 965–966, 127 L.Ed.2d 252 (1994); and *Solem v. Bartlett*, 465 U.S. 463, 470–472, 104 S.Ct. 1161, 1166–1167, 79 L.Ed.2d 443 (1984). A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process. *See*, *Marlin v. Lewallen*, *supra*; *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987); Act of May 27, 1908, ch. 199, 35 Stat. 312; Act of June 14, 1918, ch. 101, 40 Stat. 606; Act of April 10, 1926, ch. 115, § 1, 44 Stat. 239; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (Senate Committee on Indian Affairs recognized in connection with the enactment of the Oklahoma Indian Welfare Act that "all Indian reservations as such have ceased to exist" in Oklahoma) and 25 U.S.C.A. § 1452(d) (Congress defined the term "reservation" to encompass "former Indian reservations in Oklahoma"). For these reasons, this Court finds the Oklahoma Court of Criminal Appeals' decision refusing to find the crime occurred on an Indian "reservation" is not contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.

Further, in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), the Court defined an "allotment" as "a term of art in Indian law. U.S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding." *Id.* 406 U.S. at 142, 92 S.Ct. at 1466. The Oklahoma Court found the title to the land upon which

the situs of the crime occurred, "was conveyed to the Creek allottees who owned the property abutting the road." *Murphy v. State*, 124 P.3d 1198, 1204 (Okla. Crim. App. 2005). While recognizing that the situs of the crime contained a 1/12th restricted mineral interest, however, the Oklahoma Court of Criminal Appeals also noted that such an interest would be "unobservable." There can be no question, based on the facts herein, that all Indian title to the surface interest of the subject property, including the right-of-way, has long been extinguished. While restricted Indian interests to the mineral estate still exists, the Major Crimes Act was not enacted to cover crimes occurring on subsurface unobservable mineral interests. Rather, the crimes enumerated in the Act are crimes which would occur on the surface of the land, *i.e.* murder, manslaughter, kidnapping, maiming, incest, etc. Congress simply was not, by enacting the Major Crimes Act, concerned with crimes which could occur on the mineral interest of an Indian allotment. Furthermore, Petitioner fails to identify any arguable nexus between the restricted Indian mineral interest and the crime of murder.

Petitioner cites no authority to support his argument that retention of a fractional subsurface mineral interest is sufficient to subject the surface interests of the land to exclusive federal criminal jurisdiction pursuant to 18 U.S.C.§ 1151(c). Rather, Petitioner simply cites Supreme Court authority which stands for the general proposition that Indian allotments are considered "Indian country." The facts in each of the cases cited, however, are clearly distinguishable from the facts in this case in that the surface estates had not been transferred to non-Indians. *See*, *United States v. Ramsey*, 271 U.S. 467, 470–72, 46 S.Ct. 559, 560, 70 L.Ed. 1039 (1926) (original Osage Indian

allotment conveyed in fee and subject to a restriction against alienation for a period of 25 years, which period had not elapsed, and restrictions against alienation had not been removed); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914) (holding "trust allotment" during the trust period remains "Indian country"); *United States v. Hellard*, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326 (1944) (United States had interest in restricted Indian allotment partition proceedings brought by full blood heirs).

Finally, Petitioner asserts the Oklahoma court's observation that recognizing retention of "Indian country" status based solely on restricted subsurface mineral estates would seriously burden both the state and federal governments is contrary to Supreme Court law which recognizes that ". . . checkerboard jurisdiction is not novel in Indian law. . ." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). This Court finds, however, that "checkerboard" jurisdiction based not upon the observable surface estates, but upon the subsurface estates, would indeed be not only a novel approach, but also a totally unworkable and unenforceable approach. Such an approach would require an extensive title research prior to assumption of jurisdiction by either the state or federal court every time a crime occurs. Additionally, as recognized by the Oklahoma Court of Criminal Appeals, in situations where supposed heirs of the original allottee have never been judicially determined, a quiet title suit would have to be initiated before assumption of jurisdiction by either governmental entity could occur thereby returning Oklahoma to the anarchy which existed prior to the establishment

of federal courts in the former Indian territory.[27] Accordingly, this Court finds the Oklahoma Court of Criminal Appeals determination that the land in question had its "Indian country" characteristics extinguished through conveyances to non-Indians is neither contrary to nor an unreasonable interpretation of Federal law as determined by the Supreme Court.

10. Lethal Injection

In his second amended petition, Petitioner asserts that lethal injection under the protocols and procedures currently in force in Oklahoma places him at an unnecessary risk of conscious pain and suffering in violation of the Eighth Amendment. Respondent argues this claim is improperly raised in this federal habeas proceeding and should, therefore, be denied. Alternatively, Respondent asserts Petitioner's claim is procedurally barred.

Petitioner first raised this issue in the original petition for writ of habeas corpus filed herein on March 5, 2004 (Dkt. No. 14). As indicated previously, on August 30, 2004, Petitioner was notified his Petition would be dismissed on September 13, 2004, unless prior to that time, the Petition was amended to drop all unexhausted claims (Dkt. No. 27). On September 10, 2004, Petitioner filed his First Amended Petition which did not include this issue as a ground for relief (Dkt. No. 33).

Thereafter, Petitioner filed a second application for post-conviction relief with the Oklahoma Court of Criminal Appeals. In refusing to consider this issue, the Oklahoma court, after summarizing the narrow

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[27] *See, Harjo v. Kleppe*, 420 F.Supp. 1110, 1121 (D.D.C. 1976) (discussing the recurrent problems as a result of an inadequate court system to resolve civil and criminal disputes).

scope of review available under Oklahoma's Post-Conviction Procedure Act, OKLA. STAT., tit. 22, § 1089(C)(1), stated:

> In proposition three, Petitioner claims, for the first time, that Oklahoma's lethal injection procedure violates the Eighth Amendment prohibition against cruel and unusual punishment. He claims Oklahoma's "protocols" for carrying out such executions create a substantial risk of conscious suffocation or conscious suffering of excruciating pain and that several such Oklahoma executions have "gone wrong."
>
> Petitioner has waived any error relating to this claim by failing to raise it in his May 3, 2001 direct appeal brief and his February 7, 2002 post-conviction application. He admits the claim was available in March of 2001. Moreover, the statute upon which such executions are based, 22 O.S. 2001, § 1014(A), has not been amended since 1977.

Murphy v. State, 124 P.3d 1198, 1209 (Okla. Crim. App. 2005) (footnotes omitted).

As a general rule, if a petitioner has failed to present a claim to the state courts in the manner prescribed by the procedural rules of the state, the state court may deem the claim defaulted. *Wainright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Where a state prisoner defaults his federal claims in state court based upon an independent and adequate state procedural rule, federal review of his habeas claims will be barred. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553–54, 115 L.Ed.2d 640 (1991). If the state court's finding is separate and distinct from federal law, it will be considered "independent." *See Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84

L.Ed.2d 53 (1985); *Duvall v. Reynolds*, 139 F.3d 768 (10th Cir. 1998), *cert. denied*, 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998). If the finding is applied "evenhandedly to all similar claims", it will be considered "adequate." *Maes v. Thomas*, 46 F.3d 979 (10th Cir. 1995), *cert. denied* 514 U.S. 1115, 115 S.Ct. 1972, 131 L.Ed.2d 861 (1995) (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982)). Where the state-law default prevented the state court from reaching the merits of the federal claim, the claim ordinarily cannot be reviewed in the federal courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). "Review is precluded 'unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" *See Breechen v. Reynolds*, 41 F.3d 1343, 1353 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135, 115 S.Ct. 2564, 132 L.Ed.2d 817 (1995) and cases cited therein. As noted in *Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998), *cert. denied*, 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 312 (1998), the procedural default rule is not a jurisdictional rule; rather, it is based upon the principles of comity and federalism.

Petitioner argues, however, that the Oklahoma Court of Criminal Appeals finding as to when Petitioner first could have raised this issue was incorrect. Specifically, Petitioner claims the information only became available on January 12, 2004, when the State revealed through an affidavit of Warden Mike Mullin certain information regarding Oklahoma's lethal injection procedures. Additionally, Petitioner argues Oklahoma's procedural bar is not fairly and evenhandedly applied because the Oklahoma Court of

Criminal Appeals allowed his jurisdictional and mental retardation claims to be raised in his second post-conviction application. As Respondent points out, Petitioner's "Indian country" issue went to jurisdiction and therefore, could be raised at any time. Additionally, Petitioner's mental retardation issue arose as a result of new Supreme Court caselaw. Therefore, Respondent urges this Court to apply a procedural bar to Petitioner's claim.

The Tenth Circuit has held Oklahoma's post-conviction statute, OKLA. STAT., tit. 22 § 1089, which bars review of claims that could have been raised on direct appeal including issues involving fundamental, constitutional rights, is an "adequate, as well as independent, state ground" which can effectively bar federal habeas review. *Steele v. Young*, 11 F.3d 1518, 1521 (1993). Merely because the Oklahoma court authorized two of Petitioner's claims to be raised in a subsequent post-conviction application does not establish that the rule is not evenhandedly applied.

Petitioner also argues he can establish "cause and prejudice" for failing to develop this claim sooner. While a showing that a factual or legal basis for a claim was not previously available to counsel has been deemed "cause," the record in this case does not support Petitioner's assertion that the issue was not discoverable. Rather, the Oklahoma Court specifically found that the factual basis of the claim was available before Petitioner ever filed his direct appeal. *Murphy v. State*, 124 P.3d 1198, 1209 (Okla. Crim. App. 2005). This finding of fact by the Oklahoma court is presumed correct. 28 U.S.C. § 2254(e)(1). Accordingly, this Court finds Petitioner's claim regarding Oklahoma's lethal injection protocol is procedurally barred.

Assuming arguendo, that this claim were not procedurally barred, this Court would find Petitioner's

claim lacks merit. Specifically, Petitioner alleges that lethal injection causes unnecessary pain and suffering or that any number of accidents could occur with the equipment, personnel, or chemicals involved in the process which might lead to unnecessary pain and suffering. Many other forms of execution which are undoubtedly more painful or intrusive than lethal injection have withstood Eighth Amendment cruel and unusual punishment challenges. *Compare Campbell v. Wood*, 18 F.3d 662, 681–683 (9th Cir. 1994), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994) (holding hanging is not cruel and unusual simply "because there may be some pain associated with death"); *Felker v. Turpin*, 101 F.3d 95, 97 (11th Cir. 1996), *cert. denied*, 519 U.S. 989, 117 S.Ct. 450, 136 L.Ed.2d 345 (1996) (holding no merit to Petitioner's claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); and *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453 (1983) (holding the pain and terror resulting from death by cyanide gas does not render such execution method unconstitutional).[28] Furthermore, in *Hamilton v. Jones*, 472 F.3d 814 (10th Cir. 2007), *cert. denied*, — U.S. —, 127 S.Ct. 1054, 166 L.Ed.2d 783 (2007), the Tenth Circuit held Petitioner had failed to show "a substantial likelihood of prevailing on the merits" on a similar claim that Oklahoma's lethal injection protocol violates the Eighth Amendment's cruel and unusual punishment prohibition. Accordingly, this Court finds Petitioner's claim is frivolous.

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[28] *But see, Hill v. McDonough*, — U.S. —, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006) (holding, without ruling on constitutionality thereof, that cruel and unusual challenge to a particular method of lethal injection was properly raised as § 1983 action).

11. Cumulative Error

Petitioner asserts, in his eighth ground for relief, that the cumulative effect of the errors in his case warrant relief. Even though the Oklahoma Court of Criminal Appeals, in addressing this issue in Petitioner's direct appeal, held: "We have found no error, and thus we find no cumulative error." *Murphy v. State*, 47 P.3d 876, 887 (Okla. Crim. App. 2002), Petitioner asserts this ruling cannot be deemed an adjudication of the issue within the meaning of 28 U.S.C. § 2254(d). Petitioner then suggests this Court should review this issue *de novo*. However, cumulative error analysis should only be implemented where there are two or more actual errors. *See United States v. Rivera*, 900 F.2d 1462, 1470–1471 (10th Cir. 1990)(holding that a cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors). Although this Court found a harmless error occurred in admitting some of the victim impact evidence, that is the only error which was found in this case. Thus, cumulative error analysis does not apply. *See Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 362 (1999) and *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir. 1998), *cert. denied*, 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 312 (1998). Accordingly, this argument also lacks merit.

VI. CONCLUSION

After a thorough review of the Second Amended Petition for Writ of Habeas Corpus, the Respondent's Response, Petitioner's Reply, and the state court records filed herein, this Court finds Petitioner has failed to establish that he is currently in custody in violation of the Constitution, laws or treaties of the

United States as required by 28 U.S.C. § 2254(a). Therefore, for the reasons stated herein, Petitioner's Second Amended Petition for Writ of Habeas Corpus (Dkt. No. 54) is hereby denied. Additionally, for the reasons set forth herein, Petitioner's request for an Evidentiary Hearing is denied.

Finally, on May 10, 2007, Petitioner filed a Second Motion for Stay and Abeyance of Habeas Proceedings arguing, since this Court denied his first request for a stay (Dkt. No. 30) the Supreme Court in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), granted a district court authority to stay and hold in abeyance federal habeas petitions in limited circumstances. In *Rhines*, however, the Court indicated in order to ensure that the purposes of the AEDPA are not thwarted

> . . .stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Id., U.S. at 277, S.Ct. at 1535.

Petitioner claims he has shown good cause because he "has two claims currently pending in other courts, both of which he has demonstrated are at least potentially meritorious."[29] Dkt. 66, at p. 6. Respondent,

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[29] The two claims Petitioner is referring to are: (1) jurisdiction and (2) mental retardation.

however, asserts Petitioner's abeyance "should be denied as nothing more than a deliberate dilatory attempt 'to prolong [his] incarceration and avoid execution of the sentence of death.'" Dkt. 67, at p. 3 (citation omitted).

Since the filing of this motion, the United States Supreme Court has denied certiorari on the issue of jurisdiction. ***Murphy v. Oklahoma***, — S.Ct. —, 2007 W.L. 1582962 (2007). The issue of mental retardation is not currently pending before this Court. Therefore, any state court proceedings addressing that issue are not relevant to the issues currently before this Court. For these reasons, this Court finds Petitioner has failed to establish good cause for this Court to grant a stay in this matter.

ACCORDINGLY IT IS HEREBY ORDERED THAT:

1. Marty Sirmons is substituted for Gary Gibson as the party Respondent and the Court Clerk is directed to note such substitution on the record.

2. Petitioner's request for habeas relief (Dkt. No. 54) is denied.

3. Petitioner's request for an evidentiary hearing, contained within his Petition, is denied.

4. Petitioner's Motion for Stay and Abeyance of Habeas Proceedings (Dkt. 66) is hereby denied.

It is so ordered on this 1st day of August, 2007.
Dated this 1st Day of August 2007.

/s/ Ronald A. White
Ronald A. White
United States District Judge
Eastern District of Oklahoma

APPENDIX C

2005 OK CR 25

COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. PCD-2004-321

PATRICK DWAYNE MURPHY,

Appellant

v.

STATE OF OKLAHOMA,

Appellee.

Dec. 7, 2005

Gary Peterson, Kari Y. Hawkins, Oklahoma City, OK, for petitioner on appeal.

W.A., Drew Edmondson, Attorney General of Oklahoma, Preston Saul Draper, Assistant Attorney General, Oklahoma City, OK, for the State on appeal.

OPINION GRANTING IN PART PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

LUMPKIN, Vice-Presiding Judge.

Petitioner Patrick Dwayne Murphy was convicted of First Degree Murder in McIntosh County District Court case no. CF-1999-164A and sentenced to death. He appealed his conviction in case no. D-2000-705. We affirmed his conviction and sentence. *Murphy v. State,* 2002 OK CR 24, 47 P.3d 876. Petitioner then applied for post-conviction relief, but was denied. *Murphy v. State,* 2002 OK CR 32, 54 P.3d 556 (resolving all claims, except mental retardation); *Murphy v. State,*

2003 OK CR 6, 66 P.3d 456 (denying mental retardation claim).

Petitioner filed his second post-conviction application, raising three issues. We remanded the matter to the District Court for an evidentiary hearing on his first claim, relating to jurisdiction. That hearing was held in December of 2004. The parties have since submitted supplemental briefs on the issues adjudicated therein. The last brief was submitted by the State on February 2, 2005.

On numerous occasions this Court has set forth the narrow scope of review available under the amended Post-Conviction Procedure Act. *See e.g., McCarty v. State,* 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993, *cert. denied,* 528 U.S. 1009, 120 S.Ct. 509, 145 L.Ed.2d 394 (1999). The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Walker v. State,* 1997 OK CR 3, ¶ 3, 933 P.2d 327, 330, *cert. denied,* 521 U.S. 1125, 117 S.Ct. 2524, 138 L.Ed.2d 1024 (interpreting Act as amended). The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. Accordingly, claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata. Thomas v. State,* 1994 OK CR 85, ¶ 3, 888 P.2d 522, 525, *cert. denied,* 516 U.S. 840, 116 S.Ct. 123, 133 L.Ed.2d 73 (1995).

The new Act makes it more difficult for capital post-conviction applicants to avoid procedural bars. *Walker,* 1997 OK CR 3, 1 4, 933 P.2d at 331. Under 22 O.S.2001, § 1089(C)(1), only claims that "[w]ere not and could not have been raised" on direct appeal will be considered. A capital post-conviction claim could not have been raised on direct appeal if: (1) it is an ineffective assistance of trial or appellate

counsel claim which meets the statute's definition of ineffective counsel; or (2) the legal basis of the claim was not recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court, or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State. 22 O.S.2001, §§ 1089(D)(4)(b), 1089(D)(9).

Should a Petitioner meet this burden, this Court shall consider the claim only if it "[s]upport(s) a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 12 O.S.Supp.2001, § 1089(C)(2). As we said in *Walker:*

> The amendments to the capital post-conviction review statute reflect the legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent. Given the newly refined and limited review afforded capital post-conviction applicants, we must also emphasize the importance of direct appeal as the mechanism for raising all potentially meritorious claims. Because the direct appeal provides appellants their only opportunity to have this Court fully review *all* claims of error which might arguably warrant relief, we urge them to raise all such claims at that juncture.

Walker, 1997 OK CR 3, 1 5, 933 P.2d at 331 (omitted, emphasis in original). We now turn to Petitioner's claims.

In proposition one, Petitioner raises, for the first time, a jurisdictional issue. Petitioner claims that he and the victim are Indians and that the crime occurred

in Indian country. Thus Petitioner claims jurisdiction is exclusively federal under 18 U.S.C. § 1153. As such, he claims his state court proceedings are void and that he should be immediately released from the State's custody.

The crucial issue here is decidedly simple, yet remarkably difficult to resolve. The record reflects Petitioner is an enrolled member of the Muscogee (Creek) Nation, as was the victim, George Jacobs. Both are "Indians" for purpose of 18 U.S.C. § 1153,[1] as both sides readily admit.

The decisive issue, then, is whether or not the crime occurred in "Indian country,"[2] for if it did Oklahoma has no jurisdiction over the crime. *See Cravatt v. State*, 1992 OK CR 6, 1 7, 825 P.2d 277, 280 (murder prosecutions in Indian country have been "specifically reserved to the United States"); *State v. Klindt*, 1989 OK CR 75, 1 3, 782 P.2d 401, 403 ("Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.").

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[1] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder. within the Indian Country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

[2] "Indian Country" is defined as: "(a) all land within the limits of *any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished*, including rights-of-way running through the same." 18 U.S.C. § 1151 (emphasis added).

The issue is fairly fact intensive at first, for we must pinpoint where exactly the crime occurred. But then, the matter becomes primarily legal, involving the definition of Indian country under federal law.

18 U.S.C. § 1151 has three categories of Indian country: Indian reservations; dependent Indian communities; and Indian allotments, the Indian titles to which have not been extinguished. *Eaves v. State*, 1990 OK CR 42, 1 2, 795 P.2d 1060, 1061. Petitioner's claim falls primarily under subsection (c), Indian allotments, although he also presented evidence that the area was part of a Creek reservation and a dependent Indian community.

We were sufficiently concerned about the factual and legal merits of this claim to remand the matter to the McIntosh County District Court for an evidentiary hearing.[3] This Court does not remand for evidentiary hearings on a whim. An application for evidentiary hearing and supporting affidavits "must contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004). Thereafter, if this Court determines "the requirements of Section 1089(D) of Title 22 have been met and issues of fact must be

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[3] The hearing addressed the following issues: (1) Where exactly did the crime occur? (2) Who "owns" title to the property upon which the crime occurred? (3) If some or all of the crime occurred on an easement, how does that factor into the ownership question? (4) How much of the crime occurred, if any, on an easement? (5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151? (6) Is jurisdiction over the crime exclusively federal?

resolved by the District Court, it shall issue an order remanding to the District Court for an evidentiary hearing." Rule 9.7(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

At the evidentiary hearing, the parties presented diametrically opposed positions concerning whether or not the crime occurred in Indian country.

The State argued the crime occurred on a county road owned by the State of Oklahoma, a road that was never made a part of an Indian allotment and that is currently maintained by McIntosh County. Alternatively, the State argued that, should this Court find the title to the road was part of a former Creek Nation allotment, the Indian title thereto has been extinguished by prior conveyances from Creek allottees to non-Indians.

Petitioner, however, claimed the county road was an easement or right-of-way and that fee title to the land beneath that road was owned by a Creek allottee, not the State. The surface rights had since been conveyed away, but the allottee's heirs had maintained a mineral interest. Petitioner thus claimed the Indian title to the property had not been fully extinguished as required by federal statute and for that reason the whole tract remains Indian country.[4]

This issue—i.e., whether the conveyance of all surface rights to an Indian country allotment extinguishes the Indian title thereto, or whether the reservation of a small mineral interest (1/12th) by the Creek Indian allottees preserves the Indian title so that criminal jurisdiction remains federal appears to

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[4] The District Court did not admit any of Petitioner's evidence pertaining to the issue of a "dependent Indian community." This was error. Fortunately, however, Petitioner made an offer of proof and submitted substantial materials on this issue, as we discuss below.

be novel. The parties have submitted numerous cases that are, to varying degrees, relevant to the crucial issue and somewhat analogous on certain points. But none of the cases deal directly with the issue presented here.

We are thus left interpreting federal statutes, federal decisions, and state cases construing federal law in an attempt to resolve a matter of utmost importance: who has jurisdiction over the murder of George Jacobs?

The evidentiary hearing lasted one day. Following the hearing the Associate District Judge made findings of fact and conclusions of law.

As for the facts, the District Court found: the fatal wound (amputation of the victim's genitals) was inflicted while the victim was on the traveled portion of Vernon Road; the victim died in the ditch just off the east edge of Vernon Road, after his attackers dragged him there; all of Vernon Road, including the ditch where the victim was found, lies within a three rod area granted to the public for highway purposes by the Supplemental Creek Agreement of 1902;[5] 100 % of the surface and 11/12ths of the minerals to the tract of land adjacent to and directly east of the crime scene is wholly unrestricted property, owned by non-Indians; and the remaining 1/12th mineral interest appears to be a restricted interest retained by Indian heirs of a Creek allottee.

The District Court's legal conclusions were as follows: Vernon Road lies on land ceded to the State, not an easement; the original Creek allottees took their land subject to the grant for a public highway; thus the land upon which the road lies was not part of the allotment; the State of Oklahoma owns title to the

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[5] 32 Stat. 500, 502.

property on which the crime occurred; the crime did not occur in Indian country; assuming, *arguendo,* that Vernon Road does lie on an easement, said easement is perpetual and therefore not Indian country; assuming, *arguendo,* that the land under Vernon Road was conveyed to the Creek Indian allottees, the Indian title thereto has since been extinguished, as only a 1/12th mineral interest continues to be owned by Creek Indians; and criminal jurisdiction thus lies with the State pursuant to the reasoning of *Cravatt v. State.*

We agree with many of the District Court's findings and conclusions. But we cannot find factual or legal support for them all.

We readily accept the District Court's findings as to the source of the fatal wound and where it was inflicted. For jurisdictional purposes, the crime took place on both the northbound lane of Vernon Road (i.e., the road's eastern side in the N/2 SW/4 and the S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County) and the adjacent ditch. Plus, as the parties and District Court agree, both sites (the site of the fatal wound and the ditch where George Jacobs died) are within the boundaries of the three-rod (49.5 feet) area created along the section line by a 1902 Creek Nation Treaty with the United States. *See* Act of June 30, 1902, 32 Stat. 500, 502, § 10.

However, the record does not support the District Court's finding that the area in question lies on land that was "ceded to the State." We find the record, witness testimony, treaty language, and relevant cases all support a finding that the State of Oklahoma's interest in the area in question is in the nature of an easement or right-of way.[6]

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[6] This Court is not typically in the business of resolving title matters pertaining to Oklahoma property. Due to Oklahoma's

The June 30, 1902 Act, which ratified an agreement between the United States and the Creek Nation, provided, in Paragraph 10, that "Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others *shall take the title to such lands subject to this provision.*" (emphasis added). The language gives no indication that Oklahoma, which became a state in 1907, was granted fee simple title to the strip in question.

Prior to the passage of this Act, the Creek Nation already owned this same land in fee, as those lands had been long ago granted by the United States to the Creek Nation in exchange for the Creek's agreement to cede their land in Alabama and Georgia. *See Indian Country, U.S.A. v. State of Oklahoma,* 829 F.2d 967, 971 (10th Cir.1987). Even in 1890 when the Creek Nation's lands became part of what became Oklahoma Territory—the land reserved for the Five Civilized Tribes—the Creek's property remained Indian country owned in fee. *Id.* at 974, 977. When the lands were subsequently allotted to Creek Indians as per the Creek Allotment Act in 1901, "Congress was careful to preserve the authority of the government of the United States over the Indians, their land and property, which it had prior to the passage of the act." *Id.* at 979

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unique appellate court system, which places authority for resolving civil matters with the Oklahoma Supreme Court and criminal matters with this Court, matters of this type, i.e., who owns title to the strip of land upon which Vernon Road and the adjacent ditch lie, would ordinarily arise in the Oklahoma Supreme Court. However, it is our job to determine if the property is Indian Country for purposes of criminal jurisdiction.

(quoting *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309, 31 S.Ct. 578, 584, 55 L.Ed. 738 (1911)).

The language pertaining to public roads in the 1902 Act was the Creek Nation's acknowledgement of the future State of Oklahoma's right to establish public highways along the section lines, without compensating the Creek Nation therefore. The Act thus creates an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees, who took their allotment subject to the right-of-way.[7]

This interpretation is consistent with testimony and exhibits admitted at the remanded evidentiary hearing. A title opinion admitted at the hearing and rendered by attorney Keith Ham[8] finds as follows:

> We understand that there is a roadway located upon the West side of captioned property, along or upon the Section 27 and Section 28 section line. Inasmuch as we did not find any easement or other conveyance for roadway purposes in favor of the State of Oklahoma (or agency thereof) or McIntosh County, the only apparent legal basis for the establishment or the existence of a roadway . . . is pursuant to 32 Stat. 500. This statute provided that highways or roads may be established along all section lines located

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[7] Paragraph 17 of the same Act allows the Creek allottees to lease the minerals to their lands, "with the approval of the Secretary of the Interior, and not otherwise."

[8] Ham is an attorney in Bristow. He specializes in the area of title and regularly renders title opinions for banks, title companies, and the Creek Nation. He is a past president of the Creek County Bar Association and Muscogee (Creek) Nation Bar Association. Ham is well versed in the area of the Creek Allotment process.

> within the Creek or Muscogee Nation . . . . Captioned property is located within the boundaries of the Creek or Muscogee Nation and thus this statutory easement would apply to the above captioned property. This easement for roadway establishment *did not alter the fact that the allottee took title to his or her allotment and owned the fee simple title in and to their entire allotted land.* It is our opinion that the ownership of the minerals and mineral rights as owned by Joe McGilbray and Roy T. Ussrey[9] as restricted interests as set forth above *extends to the Section 27 and Section 28 section line.* In the event the roadway in the area of the Section 27 and Section 28 section line is located upon any portion of captioned property, *it is our opinion that Joe McGilbray and Roy T. Ussrey own their respective restricted ownership interest as set forth above in and under said roadway* insofar as the same is located upon captioned property.

(emphasis and added).

The State presented no expert testimony on title to the land in question that disagreed with Mr. Ham's opinion. Jeff Dell, an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State concerning the entire tract (N/2 SW/4 and S/2 NW/4 of Section 27, Township 9 North, Range 13 East, McIntosh County), which had originally been allotted to Lizzie Smith (and which is sometimes referred to as the "Busby tract"). The opinion was silent regarding any ownership in this tract by the State of Oklahoma.

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[9] McGilbray and Ussrey are Indian heirs to original Creek allottee Lizzie Smith.

However, in an affidavit attached to Petitioner's Reply to the State's Response to Petitioner's Second Application for Post-Conviction Relief, Dell stated:

> I understand that the State of Oklahoma has taken the view that the restricted ownership interest of the Busby tract is immaterial to state jurisdiction because the section line county road known as the Vernon Road, also known as NS 398, which runs on the west side of the Busby tract is the situs of the mortal wounds to the victim in Mr. Murphy's case and the road is maintained by McIntosh County. I can express no opinion regarding the significance to jurisdiction of where the injuries occurred to the victim in Petitioner's case. I can, however, clarify that the State of Oklahoma does not own the Vernon Road as it runs on the west side of the Busby tract. The Busby tract ownership, pursuant to 32 Stat. 500, 502 (1902), runs to the section line and title thereto is vested in the owners of the Busby tract and not the State of Oklahoma.

During the evidentiary hearing Dell testified the entire tract was within the historical boundaries of the Creek Nation. Moreover, some documents appear to indicate that the current non-Indian landowners of property abutting Vernon Road pay taxes with respect to the Vernon Road tract.

The Associate District Judge relied on Section 2, Article 16 of the State Constitution in finding the land in question was owned by the State and was not an easement. However, this constitutional provision was long ago studied by the Oklahoma Supreme Court in *Mills v. Glasscock*, 1909 OK 77, 110 P. 377, 378–79. There, the Court at all times treated the Constitutional provision as indicative of the State's acceptance

of an easement or right-of-way along section lines for purpose of public highways.

As for other cases, *Kansas Natural Gas Co. v. Haskell,* 172 F. 545 (C.C.E.D.Okla.1909), and cases cited therein, is particularly instructive. There, in construing similar language from similar treaties between the United States and the Cherokees, the Federal Circuit Court for the Eastern District of Oklahoma found:

> The fee to the rural public highways in that portion of this state formerly comprising Indian Territory, and now the Eastern district, does not vest in the state for the benefit of the whole people, as premised by the defense; but it does vest in the abutting landowners. The public have only a perpetual servitude or easement therein . . . . It is clear, therefore, that the fee to the land comprising rural highways in what was formerly Indian Territory vests in the abutting landowners, subject only to the easement granted the public for highway purposes, following the rule of common law.

Id. at 567–68; *see also Paschall Properties v. Board of County Commis,* 1987 OK 6, ¶ 6, 733 P.2d 878, 879 (finding similar language in Cherokee Allotment Act means allottees "take their title to these lands subject to this ability to establish roads"); *Oldfield v. Donelson,* 1977 OK 104, ¶ 7, 565 P.2d 37, 40 (State has an easement in Osage Nation section line roads).

It seems clear that title to the land upon which Vernon Road lies was conveyed to the Creek allottees who owned the property abutting the road. But now we must ascertain whether the Indian title to this particular tract has since been extinguished before state criminal jurisdiction may be exercised.

This is a challenging issue. Criminal jurisdiction is determined according to where a crime occurred, which is largely a geographic fact determination. In the instant case, the record shows the crime occurred on land originally allotted to Lizzie Smith, a member of the Creek Nation. However, all surface rights to the property have since been conveyed away to non-Indians. Thus, non-Indians own the actual physical property upon which the crime occurred, which suggests jurisdiction rightly belongs with the State.

However, not all of the fee interest in the original allotment has been conveyed to non-Indians. According to the evidentiary hearing record, while non-Indians own the surface and eleven twelfths of the minerals in the tract where the crime occurred, one twelfth of the mineral interest remains restricted with the Indian heirs of Lizzie Smith. The question is whether this small mineral interest is sufficient to qualify the property as an Indian allotment, the Indian title to which has not been extinguished, under 18 U.S.C. § 1151(c).[10]

We've found no definitive answer to this question.

The Associate District Judge, however, found the Indian title had indeed been extinguished:

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[10] A variation of this question might be whether the 1/12th mineral interest remains part of "Indian country" while the remaining interest is not. In other words, does title to the entire allotment have to be extinguished or can that allotment lose its Indian title distinction piece by piece? For example, if Lizzie Smith had conveyed the entire surface and minerals to the south half of her allotment, did that southern half lose its Indian Country label, or does it retain that label until all of the northern half is conveyed to non-Indians? And does this situation change if the conveyance was a one-half interest in the allotment as a whole?

> Even if the crime scene could be defined as Indian country based on the 1/12th restricted mineral interest remaining in the adjacent property, the wholly unrestricted surface ownership on both sides of Vernon Road, coupled with the State's compelling interest in enforcing its penal laws and protecting its citizens would permit the State to exercise jurisdiction in this case.

And yet, no witness at the evidentiary hearing took this position. Monta Sharon Blackwell, former Deputy Commissioner of Indians Affairs at the Department of the Interior, testified that the Indian title to the allotment formerly owned by Lizzie Smith had not been extinguished and that it remained Indian country as that expression is used under federal law. Ms. Blackwell testified that the Department of the Interior considered Indian mineral interests, as the dominant interests in the land, to be worthy of protection and that the mineral estate in this particular area was quite valuable. Furthermore, whenever an Indian attempted to sell an allotment, Department of the Interior representatives would encourage them to retain one half of the minerals. When asked if she would agree that the Indian title to the surface had been extinguished, Ms. Blackwell expressed doubt one could divide the surface and mineral estates "in that way." But she admitted she knew of no case that stood for the question presented here, i.e., whether a fractional restricted mineral interest is sufficient to confer criminal jurisdiction.

We, too, have not found a case that stands for that exact position,[11] although we have found several

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[11] But we've also been unable to find a case stating otherwise, i.e., that Indian title to a former allotment has been extinguished

cases that are close,[12] analagous,[13] or at least somewhat relevant.[14] But considering those authorities, the

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even though Indians have retained a fractional restricted mineral interest in the allotment.

[12] In *Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, the victim was killed on a former Indian allotment, the title of which was mixed—a 1/7th interest in the fee had been conveyed away to non-Indians. (Unlike the instant case, the surface and minerals had not been separated.) This Court found Oklahoma lacked criminal jurisdiction, ruling: "We do not find that this small interest in the property is sufficient to justify State intervention in a matter which would otherwise be statutorily reserved for the federal government." *Id.* at ¶ 19, 825 P.2d at 280. The Court then stated, "[W]e do not find that the State's interest, only marginally justified, outweighs the federal preemption in this case." *Id.* At ¶ 20; *but see Hanes v. State*, 1998 OK CR 74, 973 P.2d 330, 337 (a curiously convoluted case where the Court seems to find Indian title to the western half of the Grand river "at the location of the Miami city park" had been extinguished by conveyance in fee simple to the city of Miami).

[13] *See, e.g., C.M.G. v. State*, 1979 OK CR 39, ¶ 7, 594 P.2d 798, 801 (finding a truism of Indian law is that doubtful expressions in Indian treaties and Acts of Congress dealing with Indians are to be resolved in favor of the Indians and that cases in which land claimed to be Indian country was found not to be have involved land to which the Indians "clearly and specifically had ceded all claim, right, title, and interest to the lands without any reservation whatsoever."); *United States v. Soldana*, 246 U.S. 530, 532–33, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918) (rejecting a claim that Crow reservation Indian title to the soil on which a railroad platform stood had been extinguished, regardless of whether or not the strip in question, which was owned by non-Indians, was a mere easement or limited fee.); *Ahboah v. Housing Authority of Kiowa Tribe*, 1983 OK 20, ¶ 16, 660 P.2d 625, 629, ("[T]he Supreme Court has held that an interest in Indian lands in less than fee simple, held by a non-Indian, does not deprive the lands of their Indian character.")

[14] In *State v. Burnett*, 1983 OK CR 153, ¶ 8, 671 P.2d 1165, 1167, *overruled, in part, on a separate issue in State v. Klindt*, 1989 OK CR 75, ¶ 6, 782 P.2d 401, 403, the Court found the language "all Indian allotments, the Indian titles to which have

evidentiary hearing testimony, and the entire record before us, we remain unconvinced that the crime occurred on Indian country, at least under 18 U.S.C. § 1151(c), pertaining to allotments.

George Jacobs was murdered in McIntosh County in August of 1999. The crime occurred on a county section line road in a remarkably rural, heavily treed location, without any sort of improvement noticeable in the photographs, except perhaps a rickety barbed wire fence. The crime occurred approximately one mile north of the small town of Vernon, a town supposedly established by freed black slaves, and four or so miles from the equally small town of Hanna.

Authorities investigated the matter during the relevant time period. As a result state murder charges and a bill of particulars were filed against Petitioner. Trial was held in April of 2000, and Petitioner was convicted of First Degree Murder. Since then the matter has been continuously on appeal.

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not been extinguished" in 18 U.S.C. § 1151(c) was "broad enough to encompass all Indian allotments while the title to same shall be held in trust by the Government, *or while the same shall remain inalienable by the allottee without the consent of the United States.*" (emphasis added) (The testimony at the evidentiary hearing indicated the U.S. would have to approve any leases as to the remaining 1/12th restricted mineral interest.) *See also HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1254 (10th Cir.2000) (finding the "split nature of the surface and mineral estates does not alter the jurisdictional status of these lands" for Safe Drinking Water Act purposes: "[I]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–605, 97 S.Ct. 1361, 1372, 51 L.Ed.2d 660 (1977) (*"The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use," may create "justifiable expectations."*)

We find it significant that federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.

This case presents two separate and distinct estates in land, i.e., a surface estate and a mineral estate, each subject to being severed and separately conveyed. The uncontradicted evidence shows that the surface estate was separated from the mineral estate on the land where the crime occurred. Also, the uncontradicted evidence shows that, as to the surface estate, the Indian allotment had been extinguished by conveyances to non-Indian landowners prior to the time of the crime.

Even as to the remaining Indian allotment mineral estate, the uncontradicted evidence was that all but 1/12th had been extinguished by conveyances to non-Indians.

A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction. When two jurisdictions are competing for jurisdiction over a particular issue (or seeking to determine which has jurisdiction), it is an established principle of comparative law to look at the contacts each jurisdiction has with the subject matter at issue.[16] Here, the subject matter is criminal

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[16] For example, in the area of Due Process, the United States Supreme Court looks to a nonresident defendant's "minimum contacts" with a state to determine if jurisdiction can be exercised over that defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Court determines if a defendant's conduct and connection with the forum state are such that he should

jurisdiction, and the State of Oklahoma's contacts and interests in the subject property overwhelm the fractional interest an Indian heir may own in an unseen mineral estate.

To allow this unobservable fractional interest to control the enforcement of laws on the surface of the land would be analogous to condoning the type of serious problems enunciated by the U.S. Supreme Court this term in *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. ——, 125 S.Ct. 1478, 1493, 161 L.Ed.2d 386 (2005), i.e., a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest" that "would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." While that case dealt with a tribe attempting to reestablish sovereignty over land purchased in fee from non-Indians, the principle still applies.

The land in question had its Indian Country characteristics extinguished through conveyances to non-Indians, thus giving notice to the public that it was no longer Indian land and that the State of Oklahoma's laws would apply. While some authorities suggest, to varying degrees, that "Indian country" status may still be attached to the property in question, we have found no case holding that the retention of small (although not insignificant) mineral interest is enough in and of itself to prevent the Indian title from being considered extinguished under federal law, especially in the context of criminal jurisdiction.

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reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Criminal jurisdiction has always been tied to geography, i.e., where the crime occurred. Common sense tells us that this issue has more to do with surface rights than underground minerals, since it is virtually impossible to commit a crime against a person within a mineral interest sub-surface strata. Plus, we see little, if any, value in a system that would require a title search to the extent required here, i.e., researching allotments, heirs of allottees, and fractional mineral interests,[16] in order to determine whether criminal jurisdiction is state or federal. Such a system would seriously burden both the state and federal governments.[17]

We therefore agree with the District Court's most important conclusion: that, pursuant to the reasoning in *Cravatt*, the Indian title to the tract formerly allotted to Lizzie Smith has been extinguished for purposes of criminal jurisdiction over the crime in question. Absent clear authority requiring a different interpretation, we refuse to vacate the state murder conviction and death sentence based on a theoretical interpretation of federal law.

The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community. Unfortunately, the District Court decided, based upon the

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[16] For example, some of the evidence presented on title takes the position that the heirs of Lizzie Smith (and one of her supposed heirs) have never been judicially determined. As such, we would need a quiet title suit in order to be certain that all surface rights have been conveyed to non-Indians.

[17] Furthermore, if Petitioner's position is correct, then a great portion, if not most, of eastern Oklahoma would still be considered Indian country today. The tax implications alone would be staggering.

Assistant District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.

Be that as it may, the error was alleviated when the District Court allowed Petitioner's counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.

Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."

Ms. Blackwell and Jeff Dell both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]

The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 975, which treats the Creek Nation lands as a "reservation"

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[18] It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.

as of 1866.[19] However, the Tenth Circuit declined to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.

If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

Regarding the issue of dependent Indian communities, the evidence supporting that claim is thin, especially in regard to the issue of dependency. Petitioner has submitted photos of some Indian cemeteries and churches within three to four miles of the site, and there is an Indian community center near the town of Hanna. Petitioner has also submitted evidence that the Creek Tribal Town of Weogufkee, reportedly one of the 44 original tribal towns and founded in 1858, is somewhere nearby. Also, there is evidence of Creek Nation voting districts in the area. No evidence was submitted regarding the exact Indian demographics of this region as it stands today.[20]

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[19] The case finds the term "reservation," for purposes of defining Indian country, "simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." 829 F.2d at 973.

[20] No data from the U.S. Census Bureau was offered. However, Courts have often taken judicial notice of such data. *See e.g., Village Bank v. Seikel*, 1972 OK 123, 503 P.2d 550, 553. Hypothetically, were we to do the same here, it appears we would find that only 16.2 % of the residents of McIntosh County reported being American Indian, i.e., approximately 3,200 people over the entire county. On the other hand, white persons constituted 72.6 %, African Americans 4.1%, and Hispanics 1.3%. www.quickfacts.census.gov.

However, an affidavit states that Weogufkee had a population of 750, but that was in 1935.

A dependent Indian Community refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements: first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998). As an allotment, it is doubtful this particular tract could qualify as a part of a dependent Indian community. But, more importantly, there does not seem to be much federal superintendence. Most certainly, there is much less federal control in this case than there was in *Eaves v. State,* 1990 OK CR 42, 795 P.2d 1060, 1063, a case where we found a housing project owned by the Osage Tribal Housing Authority was not a dependent Indian community under 18 U.S.C. § 1151. We believe this case falls within the teaching of *United States v. Blair,* 913 F.Supp. 1503, 1512 (E.D.Okla.1995), and the tract in question is simply a "typical slice of rural eastern Oklahoma occupied by a mixed culture of people attempting to hold on to their agrarian roots." Proposition one thus fails.

In proposition two, Petitioner claims he was denied the right to a jury trial on the issue of mental retardation by our decision in his first post-conviction appeal. *See Murphy v. State,* 2003 OK CR 6, 66 P.3d 456. He claims this was arbitrary and capricious, a denial of equal protection, and a deprivation of rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

This Court's mental retardation jurisprudence has been in a state of flux since *Atkins v. Virginia* was

handed down. Petitioner's mental retardation claim was the first such claim addressed by this Court in the aftermath of *Atkins,* and various procedural changes have taken place since that time. While the trial judge and our prior cases have voiced strong doubts about Petitioner's mental retardation claim, a majority of this Court now finds he has provided sufficient evidence in his post-conviction appeals to raise a fact question on this issue, thereby warranting a trial on Petitioner's mental retardation claim.[21]

In proposition three, Petitioner claims, for the first time, that Oklahoma's lethal injection procedure violates the Eighth Amendment prohibition against cruel and unusual punishment.[22] He claims Oklahoma's "protocols" for carrying out such executions create a substantial risk of conscious suffocation or conscious suffering of excruciating pain and that several such Oklahoma executions have "gone wrong." [23]

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[21] I personally disagree with the Court's resolution of proposition two for the following reasons. First, Petitioner is not mentally retarded. Second, he never made a *prima facie* showing of his claim, as his abbreviated IQ test was insufficient to get him past the required threshold of providing at least one IQ test score under 70. Third, the matter is *res judicata,* as three judges from this Court (myself, Judge C. Johnson, and Judge Lile) have previously rejected this identical claim in a previous appeal. And finally, the fact that Petitioner is the only defendant who was unable to sufficiently raise a fact question concerning his mental retardation claim does not mean he was treated differently. But I defer to the majority on this issue.

[22] Petitioner also claims the procedure violates the Fifth and Fourteenth Amendments, but he never explains how.

[23] The specific allegations (chronicled by a report from an euthanasia panel and affidavits from Oklahoma State Penitentiary Warden Mike Mullin, physician Mike Heath, and two attorneys who witnessed the execution of Loyd La-fevers on January 30, 2001) are disconcerting. If true, they merit serious attention from the legislature and/or those in charge of the

Petitioner has waived any error relating to this claim by failing to raise it in his May 3, 2001 direct appeal brief and his February 7, 2002 post-conviction application. He admits the claim was available in March of 2001. Moreover, the statute upon which such executions are based, 22 O.S.2001, § 1014(A),[24] has not been amended since 1977.

DECISION

After carefully reviewing Petitioner's post-conviction application and supporting documentation, along with all matters from the remanded evidentiary hearing, we find relief is warranted with respect to his mental retardation claim. Accordingly, Petitioner's Application for Post-Conviction Relief is hereby DENIED with respect to propositions one and three, but GRANTED with respect to proposition two. This matter is hereby REMANDED to the District Court of McIntosh County for a jury trial on Petitioner's mental retardation claim, consistent with this opinion and the procedures adopted by this Court in our recent mental retardation jurisprudence.

CHAPEL, P.J., C. JOHNSON, A. JOHNSON and LEWIS, JJ.: concur.

---

statutorily based responsibility of carrying out the execution "according to accepted standards of medical practice." (See below.) However, it appears Oklahoma's protocols, i.e., the exact drugs and distribution method, are not statutorily based. Corrections officials change those protocols from time to time, as new information is gathered. If Petitioner's allegations have merit, we have every reason to believe the necessary changes will be implemented.

[24] The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician, according to accepted standards of medical practice.

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 11/09/2017]

Nos. 07-7068 & 15-7041
(D.C. No. 03-cv-443-RAW-KEW)
(E.D. Okla.)

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL Warden, Oklahoma State Penitentiary,
Respondent-Appellee.

MUSCOGEE (CREEK) NATION; SEMINOLE NATION OF OKLAHOMA; KEETOOWAH BAND OF CHEROKEE INDIANS,
Amici Curiae.

ORDER

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

These matters are before the court on the respondent's *Petition for Panel Rehearing or Rehearing En Banc.* We also have responses from the petitioner and the United Keetoowah Band of Cherokee Indians, in addition to amici curiae briefs from the United States and The Muscogee (Creek) Nation. We also have several motions pending seeking to file additional amici curiae briefs.

Upon consideration, the request for panel rehearing is denied by the original panel members. For clarification, however, the panel has decided, *sua sponte*, to amend the original decision at pages 49–50. A copy of the amended decision is attached to this order, and the clerk is directed to reissue the opinion *nunc pro tunc* to the original filing date of August 8, 2017. In addition, Chief Judge Tymkovich has filed a concurrence to the denial of rehearing, and that concurrence is likewise attached.

The *Petition*, the responses, the amici filings and the amended opinion were also circulated to all the judges of the court in regular active service who are not recused. *See* Fed. R. App. P. 35(a). As no judge on the original panel or the en banc court requested that a poll be called the request for en banc review is denied.

Finally, the motions filed by the Oklahoma Independent Petroleum Association, the Oklahoma Municipal League, and the Oklahoma Oil and Gas Association, et al., seeking leave to file amici curiae briefs are granted. Those briefs will be shown filed as of the date of this order.

Entered for the Court
/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

Nos. 07-7068 & 15-7041, *Murphy v. Royal*

TYMKOVICH, Chief Judge, concurring in the denial of rehearing en banc.

En banc review is not appropriate when, as here, a panel opinion faithfully applies Supreme Court precedent. An en banc court would necessarily reach the same result, since Supreme Court precedent precludes any other outcome. I write only to suggest this case might benefit from further attention by the Supreme Court.

As the panel opinion explains, the three-part framework of *Solem v. Bartlett*, 465 U.S. 463 (1984), governs evaluating whether Congress has disestablished an Indian reservation. But strictly applying *Solem*'s three-part framework in this context, which strongly suggests *de facto* disestablishment, evokes "the thud of square pegs being pounded into round holes." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring), *rev'd and remanded*, 551 U.S. 701 (2007), *and vacated*, 498 F.3d 1059 (9th Cir. 2007).

In 1893, Congress created the Dawes Commission to negotiate with the Creek Nation for the express purpose of extinguishing national title to lands held by the Creek Nation, preferably through allotment. Act of Mar. 3, 1893, § 16, 27 Stat. 212 at 645. The Creek Nation refused to negotiate, so Congress began imposing restrictions. Over the following five years, Congress destroyed the Creek legal system and threatened to terminate Creek land ownership unless the tribe agreed to allotment. Faced with this threat, the Creek Nation agreed to allotment in 1901. Most land owned by the Creek Nation was then allotted to individual members of the tribe. *Murphy v. Royal*, 866 F.3d 1164, 1201–02 (10th Cir. 2017).

The parties hotly dispute the inferences to be drawn from the history of the Creek Nation. I am not without sympathy for Oklahoma's argument that Congress's series of actions here effectively constitute disestablishment, but the panel properly rejected that argument: *Solem* is clear that "[o]nce a block of land is set aside for an Indian Reservation and *no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470 (emphasis added); *see also Murphy*, 866 F.3d at 1219 (explaining that allotment alone cannot terminate a reservation under Supreme Court precedent).

Supreme Court precedent thus requires that evidence of intent to disestablish be "unequivocal[]." *Nebraska v. Parker*, 136 S. Ct. 1072, 1080–81 (2016). History, however, is not always well suited to provide the unequivocal evidence of disestablishment that *Solem* requires. Sometimes history is ambiguous, making it impossible to decide between competing narratives. Historians have been debating the Fall of Rome for millennia. Sometimes there will be unequivocal evidence one way or another. But sometimes not. When confronted with contemporaneous history that is far from unequivocal, *Solem* gives the edge to the tribes.

Solem itself recognized that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . *de facto*, if not *de jure*, diminishment may have occurred." 465 U.S. at 471. But, the *Solem* Court continued, this recognition only extends so far: "When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule

that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* at 472. And *Parker* confirmed this approach. *See Murphy*, 866 F.3d at 1198 (discussing how *Parker* illustrates the significance *Solem* places in statutory text, even in the face of strong subsequent demographic evidence).

This case may present the high-water mark of *de facto* disestablishment: the boundaries of the Creek Reservation outlined by the panel opinion encompass a substantial non-Indian population, including much of the city of Tulsa; and Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law enforcement. The panel faithfully applied Supreme Court precedent holding that such "demographic evidence [cannot] overcome the absence of statutory text disestablishing the Creek Reservation." *Murphy*, 866 F.3d at 1232. But this may be the rare case where the Supreme Court wishes to enhance Steps Two and Three of *Solem* if it can be persuaded that the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood. As Justice Cardozo wrote, "[e]xtraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal." *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105–06 (1934).

In sum, this challenging and interesting case makes a good candidate for Supreme Court review.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 16, 2017]

Nos. 07-7068 & 15-7041
(D.C. No. 03-cv-443-RAW-KEW)
(E.D. Okla.)

PATRICK DWAYNE MURPHY,
Petitioner-Appellant,

v.

TERRY ROYAL Warden, Oklahoma State Penitentiary,
Respondent-Appellee.

MUSCOGEE (CREEK) NATION, *et al.*,
Amici Curiae.

ORDER

Before TYMKOVICH, Chief Judge, MATHESON, and PHILLIPS, Circuit Judges.

These matters are before the court on the respondent's *Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari*. Upon consideration, the motion is GRANTED.

Issuance of the mandate is stayed for 90 days and/or until the deadline passes for filing a certiorari petition in the Supreme Court. If this court receives notice the respondent has filed a petition the stay will continue until the Supreme Court's final disposition. *See* Fed. R. App. P. 41(d)(2)(B).

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should "revisit the governing standard for the disestablishment of Indian reservations," Pet. 3, which the Court reaffirmed just two Terms ago in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), to address the Tenth Circuit's unanimous conclusion that Congress did not disestablish the historic reservation of the Muscogee (Creek) Nation ("Creek Nation").

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INTRODUCTION

As this Court reaffirmed two Terms ago, *Solem v. Bartlett* provides the "well settled" framework for assessing disestablishment. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). "[O]nly Congress can divest a reservation of its land," and its intent must be "clear[]." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). This Court starts with "statutory language" (the "most probative" indication of congressional intent), then turns to "circumstances surrounding the" statutes (less probative), and "subsequent history" (least probative). *Parker*, 136 U.S. at 1079, 1081 (quotation marks omitted). Here, the Tenth Circuit unanimously applied *Solem*'s framework in a meticulous 126-page opinion to conclude the Creek reservation remains intact.

Having lost under this framework, Oklahoma asks this Court to "revisit" *Solem* and create a lower standard for disestablishment based on "Oklahoma's unique history." Pet. 3. This argument, however, does not warrant certiorari. First, it is waived. Oklahoma argued the *Solem* factors below, and the Tenth Circuit applied them; Oklahoma did not challenge *Solem*'s framework until now. Regardless, there is no cause to "revisit" *Solem*'s framework when this Court so recently reaffirmed it.

Oklahoma's "unique" history does not in any event justify jettisoning *Solem*. Every State arguing for disestablishment or diminishment invokes its own unique history. Nebraska did so in *Parker*. But *Solem*'s point, reaffirmed in *Parker*, is to prevent such *ad hoc* resolutions. Instead, the Court has focused in disestablishment cases, as for statutes generally, on the

text Congress enacted. Oklahoma's request to abandon settled law and ignore the text because of "unique" circumstances is better directed to Congress than to this Court, particularly because this request is aimed at reinstating Respondent's death sentence.

Moreover, Oklahoma is not unique in any relevant respect. This Court's disestablishment cases concern statutes from the Allotment Era, just like the statutes here. And contra Oklahoma, had Congress intended disestablishment, the textual indicators this Court has looked for were not uniquely unsuitable for Oklahoma. Quite the opposite: When Congress previously diminished the Creek reservation, it used hallmark language of "cession," and when Congress set goals for the federal agents sent to negotiate with the Creek, it did so again. It is therefore telling that similar language of cession is absent from the statutes Oklahoma claims effected disestablishment. Oklahoma's broader suggestion that disestablishment was a necessary function of Oklahoma's statehood cannot be squared with history: In both States and territories, reservations survived allotment. Oklahoma's statehood theory also contradicts the express acknowledgements by all three branches of the federal government that the Creek reservation continued after Oklahoma became a State.

To the extent Oklahoma seeks to rehash the Tenth Circuit's application of *Solem* to the facts, review is likewise unwarranted. Disestablishment cases are notoriously fact-specific, and this Court's most recent application is hot off the presses. Nor is certiorari warranted because the Tenth Circuit has somehow gone rogue. That court recently held that Oklahoma's Osage

reservation was disestablished during the Allotment Era, and that Wyoming's Wind River reservation was diminished. The Tenth Circuit's careful, unanimous, and correct application of settled law in this case thus warrants no further review.

That leaves the decision's supposedly devastating consequences. But in its brief filed in this Court, the United States argues that reservation status has *no* consequences for state criminal cases: It contends that, regardless, Oklahoma may retain jurisdiction. Oklahoma failed to raise that argument below, and it is not in the Petition. So while Respondent believes the United States' new argument is wrong, that is beside the point here. Oklahoma cannot seek review based on "massive disruption" when it has not preserved or presented legal issues that may bear on whether there is any disruption at all.

Regardless, Oklahoma's claims of mass disruption are overstated and misdirected. For example, although the State purports to fear the impact on existing convictions, habeas courts have already made clear that formidable obstacles preclude most challenges. Going forward, too, effects will be modest. To be sure, some small number of criminal cases will be heard in federal court, rather than state court. But when prior decisions adjusted federal/state jurisdictional lines, similar claims that federal resources would be stretched too thin proved false. Any needed regulatory coordination is no different in kind or degree from contingencies federal, state, and tribal institutions manage routinely. And if any genuine issue develops, Congress can and will

exercise its plenary power to address it, in keeping with the many statutes specific to Oklahoma and its tribes.

STATEMENT OF THE CASE

At a time when it was generally believed Congress lacked authority to alter reservations unilaterally, the Creek negotiated successfully to avoid the language this Court deems characteristic of disestablishment—language Congress had used previously to diminish the Creek reservation, and used contemporaneously to disestablish other reservations. Congress's emissary—the "Dawes Commission"—was charged with securing a cession, if possible, of all or part of the Creek lands but reported that the Nation's resistance forced it to abandon such hopes. Instead, it settled for an agreement that left Creek land in Creek hands. Congress enacted the agreement into law, and in its wake Congress, the executive, and the judiciary all acknowledged that the Nation's reservation boundaries endured within Oklahoma. And while Oklahoma after statehood indeed asserted absolute criminal and civil jurisdiction, it did so in *defiance* of Congress's statutes, in furtherance of one of this country's most shameful episodes of plunder and exploitation.

A. Historical background.

1. The Allotment Era.

This case concerns the "Allotment Era," during which Congress came to believe "tribes should abandon ... reservations and settle into an agrarian economy on privately-owned parcels." *Solem*, 465 U.S. at 466. Congress passed a series of statutes that "allotted" reservation lands to tribal members and sometimes sold

unallotted "surplus" lands to non-Indians. "Initially, Congress legislated ... on a national scale" in the 1887 General Allotment Act, *id.*, but subsequently moved to a "reservation-by-reservation" approach. *Id.* at 467. "[T]o a man," those in Congress "believed ... within a short time ... the reservation system would cease to exist." *Id.* at 468.

If that expectation were enough to "diminish reservations with the passage of every [such] act," few reservations would have survived allotment. *Id.* at 468-69. But the allotment statutes varied widely, and this Court has assessed the "effect of [each such] act," looking closely at "the language" to determine whether the statutes Congress enacted actually accomplished disestablishment. *Id.* at 469. These acts generally memorialized negotiated agreements; indeed, prior to *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), it was "thought that Indian consent was needed to diminish a reservation." 465 U.S. at 470 n.11. Some acts clearly disestablished reservations, providing reservations were "abolished," Act of April 21, 1904, ch. 1402, Pub. L. No. 58-125, 33 Stat. 189, 218, or that tribes would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (quoting 28 Stat. 286, 314, art. I); Pet. App. 97a-98a. "[O]ther[s]," lacking such language, "did not" "diminish[] reservations." *Solem*, 465 U.S. at 469.

2. Allotment and the Creek.

The Creek Nation, which once occupied much of Alabama and Georgia, is one of the "Five Civilized Tribes" (with the Choctaw, Chickasaw, Cherokee, and

Seminole). Pet. App. 63a. In the 1830s, the federal government removed the Five Tribes to the "Indian Territory," now Oklahoma. *Id.*

Congress ratified several treaties establishing, then diminishing, the Creek reservation. In 1826, 1832, and 1833, the Creek "'cede[d]'" their eastern lands, receiving in return an Indian Territory reservation, which the Creek held via fee-simple patent. Pet. App 64a (quoting Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286). In 1856 and 1866, treaties diminished that reservation: The Nation, in return for sum-certain payments, "cede[d]" lands to the Seminoles (1856) and United States (1866). Pet. App. 65a (quoting Treaty with the Creeks, art. 3, June 14, 1866, 14 Stat. 785, 786, 788 ("1866 Treaty")). The 1866 treaty recognized and preserved the Creek's "'reduced ... reservation.'" *Id.* (quoting 1866 Treaty arts. 3, 9).

The Indian Territory did not escape the Allotment Era. As elsewhere, non-Indians "pressured Congress to break up the tribal land base, [and] attach freely alienable individual title." Pet. App. 67a. The Creek reservation also faced distinctive problems. For one thing, while treaties provided the Five Tribes' lands should be held "for the equal benefit of the citizens, ... in practice" some Creek "appropriate[d] to their exclusive use" the best lands. *Woodward v. De Graffenried*, 238 U.S. 284, 297 (1915); *see Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 977 (10th Cir. 1987) ("problems developed in resolving criminal and civil disputes involving" whites who settled illegally in Indian territory).

Congress hoped to reach agreement with the Creek for a surplus land act, like ones other tribes accepted. In 1893, Congress charged the Dawes Commission with negotiating to "procure, first, ... allotment of lands," and "secondly, ... cession ... of any lands not found necessary to be so allotted ..., to the United States." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 646.

The Creek refused. The Commission "abandon[ed] all idea of purchasing" Creek lands because the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government." Pet. App. 114a (quoting Dep't of the Interior, H.R. Doc. No. 53-1, at LVX (3d Sess. 1894)).

Faced with this refusal, and given the understanding that Congress lacked authority to unilaterally alter tribal land ownership, Congress shifted approach, Pet. App. 114a-115a, enacting laws in 1897 and 1898 that sought (among other things) "to coerce tribes to negotiate." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988); Pet. App. 81a-82a. The acts abolished Creek tribal courts, Pet. App. 68a, but not the Five Tribes' legislative jurisdiction over their lands. *Infra* at 9. The 1898 act—the "Curtis Act"—also established a "default allotment scheme," which was to take effect absent a negotiated agreement. Pet. App. 81a-82a. The goal was not to terminate the Nation's treaty-guaranteed reservation; rather, the "manifest purpose," was to ensure that "beneficial use of the tribal domain should be enjoyed equally by all the members of the tribe ... according to the true intent and meaning of the early treaties." *Woodward*, 238 U.S. at 305-06.

In 1901, the Creek reached a negotiated allotment agreement, which Congress ratified. Pet. App. 82a. The Commission acknowledged it had not achieved its original aims or what had been accomplished with other tribes. It told Congress that if the Five Tribes had agreed to "a cession to the United States ... at a given price," matters would have been "immeasurably simplified," but it emphasized "the great difficulties which have been experienced in inducing the tribes to accept allotment," and stated that "a more radical scheme of tribal extinguishment" was "impossible." Pet. App. 117a (quotation marks omitted).

The agreement succeeded in keeping lands among the Creek: It "provided that '[a]ll lands belonging to the Creek,'" with limited exceptions, *see, e.g.*, Pet. App. 68a-69a, should be allotted "'among the [tribe's] citizens.'" Pet. App. 83a (quoting Act of Mar. 1, 1901, ch. 676, ¶¶ 2–3, 31 Stat. 861, 862 (1901) ("Creek Allotment Agreement")). The Creek thus avoided the cession of "surplus lands" that diminished other reservations.

The 1901 agreement further recognized the Creek government's continued legislative authority over "the lands of the tribe, or of individuals after allotment." Creek Allotment Agreement, ¶ 42. Federal responsibilities also turned on the Nation's borders: The Secretary of Interior was to "collect a grazing tax when cattle were brought 'into the Creek Nation'"; mineral-leasing rules were inapplicable "'in the Creek Nation'"; and the United States agreed to maintain anti-liquor laws "'in said nation.'" Pet. App. 88a (quoting Creek Allotment Agreement, ¶¶ 37, 41, 43). And while the 1901 agreement contemplated dissolution of the tribal

government by March 4, 1906, it made that step "subject to such further legislation as Congress may deem proper." Pet. App. 87a-88a (quoting Creek Allotment Agreement, ¶ 46).

In the meantime, this Court affirmed that neither allotment nor the abolition of tribal courts divested tribal jurisdiction over reservations, and that Congress had instead "permit[ted] the continued exercise" of a tribe's "legislative ... power" "within its borders," enforced by federal officials. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904); *see Morris v. Hitchcock*, 21 App. D.C. 565, 598 (D.C. Cir. 1903) ("abolition of the tribal courts" did not undermine tribe's "expressly continued legislative power"). In 1905, the Eighth Circuit applied this ruling to the Creek reservation. *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905) (upholding "authority" of Creek Nation to govern "within its borders").

Then, in 1906, as the Allotment Era began its slow final phase, Congress passed the 1906 Five Tribes Act, expressly disavowing tribal dissolution and providing that the "present tribal governments ... are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law[.]" Act of April 26, 1906, ch. 1876, § 28, Pub. L. No. 59-129, 34 Stat. 137, 148 ("Five Tribes Act"); *see* Pet. App. 90a n.54 (interim continuation).

Congress never provided otherwise. Two months later, Congress enacted the Oklahoma Enabling Act. Act of June 16, 1906, ch. 3334, Pub. L. No. 59-233, 34 Stat. 267 ("Enabling Act"); Pet. App. 93a. While paving the way for statehood, Congress mandated that nothing in

the new constitution "limit or impair the rights of person or property pertaining to the Indians of said Territories," or "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights." Pet. App. 94a (quoting Enabling Act § 1). The Act thus preserved "the control of the United States of the large Indian reservations ... of the new state." *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

The Act again recognized Creek borders: It specified that one House district would "comprise all the territory now constituting the Cherokee, Creek, and Seminole nations." Pet. App. 94a (quoting Enabling Act § 6). Days later, Congress confirmed "the west boundary line of the Creek Nation." Pet. App. 101a (quoting Act of June 21, 1906, ch. 3504, Pub. L. No. 59-258, 34 Stat. 325, 364).

3. Subsequent recognition of Creek reservation boundaries.

The Executive Branch and courts also continued to recognize Creek reservation boundaries. "The [Bureau of Indian Affairs'] annual reports following ... Oklahoma statehood consistently included the Creek Nation in tables summarizing reservation statistics." Pet. App. 123a. Likewise, when the Department of Interior produced "Maps Showing Indian Reservations," it included the Nation's 1866 boundaries. *See* Br. *Amicus Curiae* of Muscogee (Creek) Nation, App'x C at 29 (10th Cir. Aug. 12, 2016) (attaching map).

Courts, too, recognized that the reservation endured. After the Enabling Act, *U.S. Express Co. v. Friedman*, 191 F. 673 (10th Cir. 1911), rejected the argument that the "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state," observing that the Five Tribes "owned about 3,000,000 acres or more of land," and "[i]t would indeed be difficult to show how this land ceased to be Indian country." *Id.* at 678-79.

4. Assaults on the Creek Nation.

In the following decades, the Creek suffered setbacks to land and government. But these occurred despite, not because of, Congress's statutes.

The Bureau of Indian Affairs ("BIA") played a part. It opposed the decision to preserve the Creek government. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). So, in a campaign of "bureaucratic imperialism," it "behaved as though it had been successful in its efforts to prevent" that result, making "deliberate attempts" to "prevent [the Nation's government] from functioning." *Id.*

The BIA also did not protect the Creek from worse events unfolding on the ground. In the early 20th century, oil was discovered. That yielded "an orgy of plunder and exploitation probably unparalleled in American history," as Creek citizens were swindled out of their allotments. Angie Debo, *And Still the Waters Run* 91 (1940). There was "legalized robbery" through courts, and entire land companies formed solely for the "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." *Id.* at 117, 182.

For its part, in the wake of statehood, Oklahoma made outsized claims about its courts' jurisdiction over Indians, culminating in *Ex parte Nowabbi*. There, Oklahoma prosecuted one Choctaw for murdering another on an allotment, and the Oklahoma Court of Criminal Appeals ("OCCA") held it had authority to do so, rejecting arguments that federal jurisdiction was exclusive. 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936).

With time, Oklahoma's overreach became clear. Its courts disavowed *Nowabbi* three decades ago. *See State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 81 & n.17 (Okla. 1985). In 1987, the Tenth Circuit held that unallotted Nation-owned lands retained reservation status, reserving whether the full "exterior boundaries" remain intact. *Indian Country*, 829 F.2d at 972, 975 n.3.

5. The Creek Nation today.

The Nation never succumbed. With the 1936 Oklahoma Indian Welfare Act, its government "saw many of its powers restored," including its judicial powers. Pet. App. 130a. The Nation's new constitution, which Congress ratified, confirmed that Creek "political jurisdiction" is coextensive with the 1866 reservation boundaries and based on familiar separation-of-powers principles. Constitution of Muscogee (Creek) Nation, art. I, § 2.

Today, the Nation is thriving. It is a driver of regional economic growth, commands an annual budget

of $300 million, and employs 4,000 people.[1] The Nation operates hospitals, offers educational services, and provides other community resources to Indian and non-Indian citizens.[2] Creek law enforcement is formidable. The federally trained police force—the Lighthorse Tribal Police Department—has a dedicated K-9 Unit and Major Crimes Investigation Division. *See Amicus Curiae* Muscogee (Creek) Nation Br. in Opp. to Pet. for Reh'g En Banc at 8 (10th Cir. Oct. 25, 2017) ("Creek Reh'g *Amicus* Br."). Lighthorse officers work in partnership with the Muskogee County Sheriff's Department and have cross-deputization agreements with the BIA and most of the 40 municipal and county governments within the reservation.[3]

The Nation has well-developed courts, whose jurisdiction "extend[s] to all the territory defined in the 1866 Treaty with the United States." *Enlow v. Bevenue*, No. SC-94-02, 1994 WL 1048313 at *2 (Muscogee Creek Nat. Sup. Ct. Oct. 13, 1994). A district court exercises

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[1] Mvskoke Media, *2018 budget passes during emergency session* (Sept. 25, 2017), https://mvskokemedia.com/2017-budget-passes-during-emergency-session/; Muscogee (Creek) Nation, Official Guide to the Muscogee (Creek) Nation at 3, http://creektourism.com/wp-content/uploads/2017/01/Guide_Web_MCNTR17.pdf.

[2] *See* Muscogee (Creek) Nation, http://www.okmulgeedevelopment.com/About-Okmulgee/Muscogee-Creek-Nation.aspx (last visited Apr. 3, 2018).

[3] Creek Reh'g *Amicus* Br. at 8-9; Tony Russell, *Muskogee County Sheriff's Office partnering with Lighthorse Police, KJRH* (June 5, 2017), https://www.kjrh.com/news/local-news/muskogee-county-sheriffs-office-partnering-with-lighthorse-police.

criminal and civil jurisdiction, and a seven-member Supreme Court hears appeals. *See* Muscogee Code, tit. 27, http://www.creeksupremecourt.com/wp-content/uploads/title27.pdf.

B. Factual background and proceedings below.

Respondent Patrick Dwayne Murphy, a Creek, was convicted of the murder of another Creek within the Nation's reservation and sentenced to death. Pet. App. 7a, 10a-11a, 14a-15a. The OCCA affirmed. *Id.*

Respondent sought state post-conviction relief, arguing the State lacked jurisdiction under the Major Crimes Act. Pet. App. 13a. That act provides for exclusive federal government jurisdiction to prosecute murders by Indians in "Indian country," which includes, among other things, "Indian reservation[s]" and certain "allotments." 18 U.S.C. §§ 1151, 1153. The OCCA ordered an evidentiary hearing. Pet. App. 14a. The trial court held that state jurisdiction was proper because the crime occurred on state land, Pet. App. 15a, rejecting Respondent's argument that the land was an "allotment"; the court did not address Respondent's reservation argument. Pet. App. 16a.

The OCCA affirmed. It noted that *Indian Country* reserved the disestablishment question, and stated that if "federal courts remain undecided ..., we refuse to step in and make such a finding." Pet. App. 224a. This Court denied certiorari. Pet. App. 18a-19a n.12.

On federal habeas, the district court denied relief. Pet. App. 20a-21a.

Respondent appealed.[4] The Tenth Circuit found that the OCCA's "refus[al]" to "make ... a finding" was an adjudication "on the merits" under 28 U.S.C. § 2254(d), triggering deferential review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pet. App. 49a. It also assumed AEDPA deference applies even to jurisdictional challenges. *Id.*; *cf. Magnan v. Trammell*, 719 F.3d 1159, 1164 (10th Cir. 2013) (reserving question). The Circuit thus required Respondent to show that the OCCA's decision was "contrary to," or an "unreasonable application of" clearly established federal law. Pet. App. 25a-26a (quotation marks omitted).

Applying that state-friendly standard, the Tenth Circuit reversed. First, it found the OCCA's decision was "contrary to" clearly established federal law. Among other things, the OCCA required "evidence that the Creek Reservation had not been disestablished," ignoring the "'presumption' that an Indian reservation continues to exist until Congress acts to disestablish" it, and it failed to consider *Solem*'s "three ... factors." Pet. App. 52a (quoting *Solem*, 465 U.S. at 481).

The Tenth Circuit thus analyzed disestablishment *de novo*. Pet. App. 56a. It "appl[ied] the *Solem* framework," doing so after Oklahoma "recognize[d]

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[4] Respondent also pressed a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). The OCCA rejected this claim, and Respondent sought federal habeas. Pet. App. 21a. The district court treated Respondent's petition as a "second and successive" application and transferred it to the Tenth Circuit, which "ordered a partial remand." Pet. App. 21a n.15 (citing *In re Murphy*, No. 12-7055, at 2 (10th Cir. Nov. 1, 2012)). Then-Judge Gorsuch was on the panel.

Solem [a]s controlling," "defend[ed] the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test," and "[n]owhere ... argue[d] that some other legal framework applie[d]." Pet. App. 44a-45a, 74a.

The Tenth Circuit began with *Solem*'s "most probative" step—"statutory language." Pet. App. 77a (quoting *Solem*, 465 U.S. at 470). It observed that Oklahoma did "not rely on any particular statutory text," or any "'specific section'" indicating disestablishment, but rather "the cumulative force of ... eight statutes." Pet. App. 77a, 101a. The court did not require "magic words." Pet. App. 101a (quoting *Wyoming v. EPA*, 849 F.3d 861, 869-70 (10th Cir. 2017)). Rather, it analyzed all eight statutes and concluded that they "do not, individually or collectively, show" disestablishment. Pet. App. 107a. Instead, they "show[ed] Congress's continued recognition of the Reservation's boundaries." Pet. App. 103a; *see* Pet. App. 101a-102a; *supra* at 8-10.

Next, the Tenth Circuit explained that even absent "clear textual evidence," "contemporary historical evidence" can "reveal that Congress has disestablished ... a reservation," if "'unambiguous evidence' ... 'unequivocally reveals' congressional intent." Pet. App. 107a-08a (quoting *Parker*, 136 S. Ct. at 1080-81 (some quotation marks omitted)). The Tenth Circuit had recently relied on such "step-two evidence to find disestablishment" of another Oklahoma reservation. Pet. App. 108a (citing *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010)). But here, the "mixed evidence ... falls short." Pet. App. 109a.

Last, the Tenth Circuit considered "step-three" evidence—"Congress's own treatment of the affected areas" in the immediately following years; the approach of "the [BIA] and local judicial authorities"; and "demographic facts." Pet. App. 120a-21a (quoting *Solem*, 465 U.S. at 471). It recognized this Court's decisions deem such evidence less important and have "never relied solely on this third consideration to find diminishment." Pet. App. 121a (quoting *Parker*, 136 S. Ct at 1081). Nonetheless, the court of appeals exhaustively analyzed the step-three evidence, concluding that the "conflicting" evidence did not show disestablishment. *Id.*

The Tenth Circuit "conclude[d] Congress has not disestablished the Creek reservation." Pet. App. 132a. Oklahoma had nowhere argued that Respondent's conviction might stand even if the reservation remained, and thus the court held that Oklahoma "lacked jurisdiction." Pet. App. 133a. Oklahoma sought rehearing *en banc*, which was denied without dissent. Pet. App. 229a. Concurring, Chief Judge Tymkovich, who sat on the unanimous panel, explained it had "faithfully applied Supreme Court precedent," which "precludes any other outcome." Pet. App. 230a.

Today, Respondent remains on death row. Before prison, alcohol had been a constant—from when Respondent's mother subjected him to it in utero, put beer in his baby bottles, and allowed him to get drunk from the age of 4, to when Respondent, intoxicated, committed the murder for which he was sentenced to death. The facts of Respondent's crime are undeniably grave. But in prison, Respondent has successfully

defeated his alcohol addiction and has converted to Christianity. He has generally been a model prisoner, exhibiting such responsibility that his unit manager appointed him the "run man"—reserved for inmates who have earned prison officials' trust. Under the Tenth Circuit's decision, Respondent is subject to prosecution by federal authorities and life imprisonment without the possibility of parole.

REASONS FOR DENYING THE PETITION

Oklahoma seeks certiorari so this Court can "revisit the governing standard for ... disestablishment," and create a lower, atextual standard based on "Oklahoma's unique history." Pet. 3. Oklahoma asks this Court to deem *Solem* applicable only to alleged disestablishments arising out of the "General Allotment Act that spawned surplus land acts," and hold *Solem* does not govern here because "Oklahoma statehood" was Congress's aim. Pet. 3, 30. This argument is unworthy of certiorari. It is waived, because Oklahoma never argued below that *Solem*'s framework was inapplicable. It is not the subject of any split, as no court has reached a contrary result outside of Respondent's case or adopted a one-off exception of the type Oklahoma seeks. And it is especially ill-timed because this Court just reaffirmed *Solem* in *Parker*, after hearing similar arguments about the need to account for Nebraska's unique history.

In reality, Oklahoma's request to "revisit the ... standard," Pet. 3, is just a Trojan horse for further review of the Tenth Circuit's factbound application of *Solem*. But certiorari is not warranted to review careful, and correct, application of settled law. Oklahoma thus falls back on claims about practical effects. Yet it has

forfeited an argument—flagged by the United States—that (if correct) would largely eliminate those effects. Regardless, on inspection, Oklahoma's alarmism proves vastly overstated and provides no basis for review.

I. Certiorari is not warranted to address Oklahoma's waived argument seeking to revisit "well settled" doctrine.

A. Oklahoma's argument is waived.

Oklahoma waived the argument it now presses. The Tenth Circuit was express:

> Despite its arguments that there is no clearly established law, the State's brief recognizes *Solem* is controlling. It defends the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test. Nowhere does the State argue that some other legal framework applies.

Pet. App. 45a. That forecloses Oklahoma from seeking certiorari to "revisit" *Solem*'s framework as "not designed to analyze this situation." Pet. 3, 31.

Oklahoma asserts that it "argued below that *Solem* was inapposite." Pet. 31 n.8. But the cited pages confirm the Tenth Circuit was right. The parties briefed two issues. First, Oklahoma raised an AEDPA argument that no "clearly established federal law" existed because the "'facts'" of this Court's cases were insufficiently "'similar.'" Br. of Respondent-Appellee at 46-67 (10th Cir. Nov. 4, 2016) ("Okla. Br."). Oklahoma's cited pages address that argument, which the Tenth Circuit

rejected. Pet. App. 45a.[5]

Second, Oklahoma argued that, "de novo," the Creek reservation was disestablished. Okla. Br. 56. That is the only issue raised in the Question Presented. Pet. i. And with respect to that argument, Oklahoma "defend[ed] ... the OCCA's decision by reference to *Solem*'s three-part test." Pet. App. 45a; *see* Okla. Br. at 57, 68, 76 (*Solem*'s three parts).

Oklahoma also cites (at 31 n.8) page 91 of its brief below, apparently referencing the statement that "this case presents a very different situation" from the Court's prior cases. Okla. Br. 91. But Oklahoma merely asserted a supposed factual distinction that it believed strengthened its argument under *Solem*'s framework. It never argued that the framework was inapplicable or needed "revisit[ing]." Pet. 3. Indeed, Oklahoma identified as "[t]he most closely analogous case" the Tenth Circuit's *Irby* decision deeming the Osage Nation's reservation disestablished. Okla. Br. 91 (citing *Irby*, 597 F.3d at 1120). That case was on point, Oklahoma believed, because the Osage was also "exempt

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[5] Oklahoma has not sought review of the Tenth Circuit's AEDPA analysis. Pet. i. In one sentence, Oklahoma alludes to AEDPA's "clearly established" standard. Pet. 31. But if Oklahoma included this sentence as a wedge to raise AEDPA arguments at the merits stage, it is insufficient to preserve the argument. And Oklahoma's implicit threat to make this an AEDPA case is another reason to deny certiorari. The AEDPA issue Oklahoma lost is factbound. And if Oklahoma raises AEDPA issues, Respondent reserves the right to raise the AEDPA arguments he briefed to the Tenth Circuit. This Court should not grant certiorari with those complications looming.

from the General Allotment Act," and the "Osage Allotment Act" coincided with the Oklahoma Enabling Act. *Id.* And in *Irby*, the Tenth Circuit "appl[ied] the three-part test ... in *Solem*." *Irby*, 597 F.3d at 1122.

This Court does not grant certiorari to address arguments not pressed or passed upon below. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002). If Oklahoma wishes to pursue its new argument, it can allow lower courts to weigh it in a case where Oklahoma has not told them the opposite. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

B. Oklahoma's argument does not implicate any split, is meritless, and does not warrant certiorari.

Oklahoma's argument amounts to special pleading. It claims Oklahoma's "unique history" and Congress's overarching intent "to create a new state" render *Solem* inapplicable; Oklahoma would limit *Solem* to "surplus land acts." Pet. 3, 24, 31. But Oklahoma does not identify a split on these issues. It cites no decision deeming *Solem* inapplicable to cases involving Oklahoma's statehood. Indeed, Oklahoma cites no case recognizing *any* flavor of one-off exception from *Solem*. Federal circuits have applied *Solem*'s framework to all diminishment or disestablishment claims, whether or not based on surplus land acts. *E.g.*, *United States v. Jackson*, 853 F.3d 436, 439 (8th Cir. 2017) (act "was not a surplus lands act"), *cert. denied*, 138 S. Ct. 975 (2018); *Irby*, 597 F.3d at 1123 ("no surplus lands"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1219 (10th Cir. 2005) (1854 treaty); *Oneida Indian Nation of N.Y. v.*

City of Sherrill, 337 F.3d 139, 158-65 (2d Cir. 2003) (1838 treaty), *rev'd and remanded on other grounds*, 544 U.S. 197 (2005).

The Court heard similar special pleading in *Parker*, where Nebraska asserted that relevant statutes "predate and differ from" the "run-of-the-mill allotment act[s]." Br. for Pet'r's at 44, 46, *Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2015 WL 7294863. Those claims did not impress this Court, and *Parker* unanimously reaffirmed *Solem*. 136 S. Ct. at 1079. Two years later, no split has developed, and such arguments are not worthy of reconsideration.

In fact, courts have rejected the conclusion Oklahoma's argument yields. Oklahoma argues that *Solem*'s framework is inapplicable, and disestablishment occurred, based on Congress's supposed overarching intent to "liquidat[e] the Five Tribes as territorial sovereigns." Pet. 31. If that were correct, no Five Tribes land would have remained reservations, including tribally owned lands. But for a century, courts have held otherwise: The Tenth Circuit in 1911 explained that "[a]t the time of [its] decision," the Five Tribes "owned about 3,000,000 acres," and it would "be difficult to show how this land ceased to be Indian country." *Friedman*, 191 F. at 679. That was consistent with *Buster*'s conclusion that "the borders of th[e Creek] nation" endured. 135 F. at 950, 953. *Indian Country* likewise held that Creek-owned lands "retain their reservation status." 829 F.2d at 976.

Oklahoma's argument is thus a ruse. It teases this case as a chance to "revisit the governing [disestablishment] standard." Pet. 3. But Oklahoma

does not identify any *other* standard to apply. And it is difficult to imagine what alternative exists, apart from abandoning *Solem*'s text-based inquiry. That would be at odds with this Court's approach to interpreting statutes; would revive the atextual and amorphous approach to disestablishment *Solem* (and *Parker*) sought to inter; and would ignore the bedrock Indian-law rule that to abrogate tribal treaty rights, Congress must not just speak, but speak clearly. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). Instead, although Oklahoma purports to serve up a legal question concerning "governing standard[s]," Pet. 3, it really seeks to relitigate the application of settled law.

Oklahoma's argument that *Solem*'s framework should not apply also lacks merit. Its refrain is "statehood is different." Pet. 3, 6, 7, 12, 17, 23, 24, 26, 27, 28, 33. But reservations routinely persist inside States, and even if Congress viewed *allotment* as necessary for statehood, "allotment" can be "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). *Solem*'s framework exists precisely to identify which such acts altered reservation status. 465 U.S. at 468-69.

Especially strained is Oklahoma's attempt to avoid *Solem* by distinguishing the statutes here from "surplus land acts." Pet. 24. These statutes are from the same Allotment Era (1890 through 1910), and the motivations for allotment were similar. *Supra* at 4-7.[6] *Solem*'s

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[6] *Hagen v. Utah*, 510 U.S. 399, 402-07 (1994) (early 1900s); *Yankton*

admonition to look to text for clear indications of congressional disestablishment thus applies equally.

Indeed, the absence of a surplus land act makes the State's case for disestablishment weaker here. Congress hoped the Commission could negotiate a surplus land act—"first, ... allotment" and "secondly, ... cession of any lands not ... so allotted." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 646. But the Creek negotiated to avoid cession, ensuring the entire body of Creek lands would remain intact and (with limited exceptions) be allotted to Creek citizens, and that the 1901 agreement would include no language characteristic of disestablishment, such as "[e]xplicit reference to cession" to the United States, a commitment "to compensate the tribe for its land with a fixed sum," or language restoring lands to "the public domain." *Parker*, 136 S. Ct. at 1079 (quotation marks omitted). The absence of text effecting disestablishment was no accident.

Oklahoma says the Court should not expect to find the language *Solem* contemplates because Creek lands were not traditional reservations but were held "in fee simple." Pet. 30. Congress, however, characterized those lands as a "reservation" in the 1856 and 1866 treaties, and diminished its boundaries using express language of "cession." *Supra* at 6; *see* Treaty with the

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Sioux Tribe, 522 U.S. at 329 (1894 Act); *Solem*, 465 U.S. at 464 (1908 Act); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977) (1904, 1907, and 1910 acts); *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 441-42 (1975) (1891 Act); *Mattz*, 412 U.S. at 484-85 (1892 Act); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962) (1906 Act).

Creek and Seminole Tribes, arts. 1, 3, 6, 11 Stat. 699, 700; 1866 Treaty art. 3. Likewise, the Commission's instructions were to negotiate for "cession" at "a given price." *Supra* at 7; Pet. App. 117a. Such language was absent from the ensuing statutes not due to unique features of Creek land or Oklahoma history, but because the Creek refused to assent to disestablishment, as Congress believed was required.

* * *

The argument on which Oklahoma urges this Court to grant review is thus waived, not subject to any split, and meritless.

II. Certiorari is not warranted to address the Tenth Circuit's correct application of settled law.

Oklahoma does not argue certiorari is warranted to address the Tenth Circuit's application of *Solem*. The Tenth Circuit duly applied *Solem* in a 126-page exegesis of statutes, caselaw, and history. Pet. App. 1a-133a. That analysis is factbound, and lower courts' application of a "well settled" "framework," *Parker*, 136 S. Ct. at 1078, generally warrants no further review. Although this Court has on occasion reviewed reservation cases without splits, Pet. 16, factbound review here is especially unwarranted given *Parker*'s recent application of *Solem*. Moreover, this is not a case where a circuit is systematically misapplying a general standard in ways meriting intervention absent a split. Twice since 2010, the Tenth Circuit has found reservations disestablished or diminished, including an

Oklahoma reservation. *Irby*, 597 F.3d at 1120; *Wyoming*, 849 F.3d at 865 (Tymkovich, C.J.).

The Tenth Circuit was also correct. As Chief Judge Tymkovitch observed, "Supreme Court precedent precludes any other outcome." Pet. App. 230a. Oklahoma concedes it cannot identify any "specific terminology" effecting disestablishment. Pet. 32; *see* Pet. App. 77a. That is because the Creek negotiated to avoid such language. *Supra* at 7. Its absence is especially telling because when Congress diminished the Creek reservation in 1856 and 1866, it used hallmark diminishment language, *supra* at 6—"undermin[ing the] claim that Congress intended to do the same with the reservation's boundaries in [the later statute] as it did in [the earlier]." Pet. App. 100a (quoting *Parker*, 136 S. Ct. at 1080) (alterations in original).

Contemporaneous events make the absence yet more significant. Congress instructed the Commission to seek "a cession, for such price ... as shall be agreed upon"—hallmark disestablishment language and the very language Oklahoma asserts "would have been unnecessary or senseless under [Oklahoma's] unique circumstances." Pet. 31; *supra* at 7; Pet. App. 80a. But the Creek refused, and Congress—still believing tribal consent necessary to alter reservations—enacted the 1901 Allotment Agreement lacking such provisions. *See Parker*, 136 S. Ct. at 1081 n.1 ("[W]hat the tribe agreed to [before *Lone Wolf*] has been significant"). After *Lone Wolf*, Congress could have returned to effect disestablishment—as, elsewhere, it did. *Hagen v. Utah*, 510 U.S. 399, 416-17 (1994). But it did not. Hence,

Oklahoma "failed at the first and most important step." *Parker*, 136 S. Ct. at 1080.

Other relevant "text" and "surrounding circumstances," Pet. 32 (quoting *Hagen*, 510 U.S. at 412), point the same way and certainly do not "unequivocally" show disestablishment, *Solem*, 465 U.S. at 470-71. While some federal officials may have hoped to strike an agreement with language characteristic of disestablishment, the Commission "abandon[ed]" such hopes. *Supra* at 7. The legislative history is replete with evidence that the legislation that Congress *actually ratified* aimed to fulfill "the true intent and meaning" of the Creek treaties by placing "each and every member of the tribes ... in possession of his share of the common lands." *Woodward*, 238 U.S. at 299 & n.2, 306 (quoting House Report).

Oklahoma relies on a purported "dissolution of the tribal government," Pet. 33, that never occurred and "Congress later expressly repudiated," *Indian Country*, 829 F.2d at 979—and it disregards Congress's recognition that so long as the Creek government persisted, its reservation did too. The allotment agreements recognized both the Nation's continuing jurisdiction over "lands ... of individuals after allotment" and the continuing force of its boundaries—distinguishing lands "in the Creek Nation" for purposes of cattle management, liquor laws, and mineral leasing. Creek Allotment Agreement, ¶ 42; Pet. App. 89a-90a; *supra* at 8-10. Decisions in 1904 and 1905 recognized that allotment had not eliminated the jurisdiction of the Five Tribes and the Creek Nation "within [their] borders." *Morris*, 194 U.S. at 389; *Buster*, 135 F. at 950.

And in 1906, Congress preserved that status quo indefinitely. *Supra* at 9; *see also Friedman*, 191 F. at 678-79 (stating in 1911 that under the Five Tribes Act the "tribal governments still exist" and continue to hold millions of acres of "Indian country" (quoting Enabling Act)).

The Oklahoma Enabling Act, too, specified the "territory now constituting the ... Creek ... nation[]" for inclusion in a House district, and stipulated that statehood would not "limit" Indian rights or the United States' authority over Indians. Pet. App. 94a (quoting Oklahoma Enabling Act). Such caveats reflected "the control of the United States of the large Indian reservations and Indian population of the new state." *Coyle*, 221 U.S. at 570. Days later, Congress confirmed the Nation's "boundary line." *Supra* at 10. Oklahoma's claim that the Nation's reservation "evaporated by the formation of Oklahoma," Pet. 30, is thus refuted by history.[7]

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[7] Oklahoma's "clash[]" with the Major Crimes Act, Pet. 27, is nonexistent. Oklahoma contends the Enabling Act transferred only "federal-question and diversity" *civil* cases to newly created federal courts, sending "*all* other cases" to state courts, including criminal cases covered by the Major Crimes Act. Pet. 26. But the Enabling Act sent to federal court "all causes pending ... arising under the ... laws ... of the United States," § 16, 34 Stat. at 276—which includes federal *criminal* cases. Indeed, that provision was amended in 1907 to make clear that prosecutions of "all crimes" of a federal nature should go to the new federal courts. Act of Mar. 4, 1907, ch. 2911, Pub. L. No. 59-246, 34 Stat. 1286, 1287. Oklahoma cites a handful of cases where Oklahoma courts exercised jurisdiction. Pet. 27-28 & nn.5-6. But that shows only what was already clear from cases like

Mostly, Oklahoma relies on *Solem*'s third consideration—"treatment of the affected areas, particularly in the years immediately following the opening." *Solem*, 465 U.S. at 471-72. But "this Court has never relied solely on this third consideration to find diminishment," *Parker*, 136 U.S. at 1081 (quoting *Mattz*, 412 U.S. at 505), and doing so here would be particularly inappropriate given the lawless plunder and overreach that characterized the early post-statehood era. Regardless, while Oklahoma invokes "justifiable expectations" based on its "century" asserting jurisdiction, Pet. 33-34 (quotation marks omitted), *Parker* rejected the same argument: "[E]xpectations alone ... cannot diminish reservation boundaries." 136 S. Ct. at 1082.

The Tenth Circuit correctly held this case should not be the first to find disestablishment based on *Solem*'s third factor. At most, the evidence is "conflicting." Pet. App. 123a; *see* Pet. App. 121a-132a. Congress continued to pass laws recognizing the Nation's boundaries, and courts continued to affirm that the Nation retained authority over its reservation. *Supra* at 8-10. The Department of Interior and BIA continued to include the reservation on tables and maps. *Supra* at 10. Meanwhile, the "Creek Nation has maintained a significant and continuous presence within the Reservation," including inhabiting a "capital complex," providing "extensive services within [its] borders," and exercising its significant law-enforcement function. Pet.

Nowabbi—that Oklahoma exercised Indian country jurisdiction without congressional authorization.

App. 130a; *supra* at 12-14. That makes this case "much stronger ... than" *Parker*, where "'the Tribe was almost entirely absent ... for more than 120 years." Pet. App. 130a (quoting *Parker*, 136 S. Ct. at 1081).[8]

III. Oklahoma's unsupported claims of "disruption" do not warrant certiorari.

With no legal question warranting review, Oklahoma raises the specter of "disruption" and "uncertainty." Pet. 21. Such claims are stock features in disestablishment cases,[9] and have never proven true.

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[8] Oklahoma observes that the federal government generally lacks jurisdiction to prosecute minor Indian-on-Indian crimes, and that Congress abolished Creek courts in 1898. Pet. 28-29. Had Oklahoma courts not asserted jurisdiction, Oklahoma says, "*no* court" would have had jurisdiction after statehood, resulting in a "jurisdictional gap." *Id.* But there was no gap. After the Creek courts' abolition, the federal territorial courts had jurisdiction over Indian-on-Indian minor crimes, unlike on most reservations. And this Court has explained that federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before." *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *see Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911). Even had a "gap" existed, moreover, it is not one that would have concerned Congress. In 1883, the BIA began establishing "Courts of Indian Offenses" on reservations where tribal courts were absent or deemed deficient. *Colliflower v. Garland*, 342 F.2d 369, 372 (9th Cir. 1965) (quotation marks omitted); *see Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991). While the BIA did not initially include the Fives Tribes, the availability of this off-the-rack solution meant that Congress had no need to fear on-reservation "jurisdictional gaps."

[9] Case in point are the state's briefs in *Solem*. *Compare* Reply Brief of Pet'r's at 9, *Solem*, 465 U.S. 463 (1984) (No. 82-1253) ("*Solem* Reply") (constraints on federal "resources" will mean "many ...

And Oklahoma emphasizes the Creek reservation's physical size, Pet. 15-18—but ignores the 1.6 million acre reservation recognized in *Solem*, where similar sky-is-falling claims proved unfounded. 465 U.S. at 464; *supra* n.9.

Indeed, although the Petition invokes the purported "implications for criminal jurisdiction" of the decision below, Pet. 18, the United States argues that there are none: even if the Creek reservation endures, "Oklahoma still would have criminal jurisdiction." U.S. Br. 15. This argument was not presented below, or in the Petition, and this Court should not entertain it. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 531 (1979). And the State had good reason not to raise the issue. Federal and state courts have rejected the United States' position, and this Court has denied certiorari when the United States urged review. *See infra* at 37. But the United States may raise the argument in future cases, and the fact that the State's principal amicus believes that the decision

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crimes may go unpunished"), *with* Pet. 19 ("new responsibilities would overwhelm current federal resources"); *compare Solem* Reply at 10 (specter of "tribal civil and regulatory authority over non-Indians"), *with* Pet. 20 (non-Indian "residents ... would potentially be subject to tribal regulatory jurisdiction"); *compare Solem* Reply at 11 ("[n]on-Indians must also resort to tribal courts ... to litigate claims against Indians"), *with* Pet. 20 (broader "tribal-court jurisdiction"); *compare Solem* Reply at 9 (land has "not been regarded as reservation ... for several decades"), *with* Pet. 34 ("[f]or a century, Oklahoma has governed the former Indian Territory"). This Court heard similar arguments about the Nez Perce Reservation, Br. of Lewis Cty., Idaho as *Amicus* Curiae in Support of Pet'r at 3-4, *Webb v. United States*, 531 U.S. 1200 (2001) (No. 00-8166), 2001 WL 34125377, yet denied certiorari.

below will have no consequences for criminal jurisdiction saps a Petition based on "consequences," Pet. 2, of its force.

Even Oklahoma's hand-picked examples of disruption prove misleading on inspection. Oklahoma implies, for example, that in *State v. Kepler*, CF-14-3952, the defendant cynically "obtained identification documents ... claiming to be 1/128th Creek" to dismiss based on *Murphy*. Pet. 22. In fact, the defendant has been a Creek citizen since 1989 and merely received a new identification card. Verified Mot. to Dismiss, Ex. A, *State v. Kepler*, CF-14-3952 (Okla. Cty. Dist. Ct. Aug. 11, 2017). Similar is *McKesson*, where the Cherokee sued a pharmaceutical company in tribal court. Oklahoma implies Cherokee jurisdiction turns on a *Murphy* theory that the Cherokee reservation was "never disestablished." Pet. 23. In fact, the Cherokee sued before *Murphy* was decided, and a federal court enjoined that suit after *Murphy* for reasons unrelated to *Murphy*. *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *9 & n.7 (N.D. Okla. Jan. 9, 2018).

Nor is Oklahoma correct that *Murphy* compels the same result for the Cherokee and the other Five Tribes. "[R]eservation disestablishment" is "inherently statute-specific and fact-bound." Br. for United States as Amicus Curiae at 9, *Osage Nation v. Irby*, 564 U.S. 1046 (2011) (No. 10-537), 2011 WL 2135025; *see* Pet. 17 (statutes and history "vary from tribe to tribe"); *Cohen's Handbook of Federal Indian Law* § 4.07[1][c], at 302 & n.773-74 (2005 ed.) (noting differences among Five Tribes' allotment statutes).

Similarly overstated is Oklahoma's assertion about the number of "state convictions [that] will be subject to collateral attack." Pet. 21. AEDPA's statute of limitations bars virtually any action not filed within one year after state proceedings conclude. 28 U.S.C. § 2244(d)(1). Any defendant who *previously* filed a federal petition must meet the strict "second or successive" requirements. *Id.* § 2244(b)(2)(A), (b)(2)(B)(i). Already, the Tenth Circuit has held that a *Murphy*-based successive petition could not do so. Order at 3, *In re Brown*, No. 17-7078 (10th Cir. Dec. 21, 2017); *see In re Wackerly*, No. 10-7062, 2010 WL 9531121, at *3 (10th Cir. Sept. 3, 2010). State courts, too, limit defendants from challenging long-final convictions. *See, e.g.*, Okla. Stat. tit. 22 § 1086 (requiring "sufficient reason" to consider successive petition); *Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995) ("laches" may "prohibit the consideration" of challenges to long-final convictions).

Prospectively, there is no risk crimes will go unpunished; at most, *Murphy* realigns responsibility. Oklahoma retains full jurisdiction in non-Indian cases. Dep't of Justice, Indian Country Criminal Jurisdictional Chart, 2010, http://bit.ly/2GQZgav. "[M]inor offenses" involving Indians will proceed in the Nation's robust courts. Pet. 18; *supra* at 13-14. The United States will prosecute major crimes involving Indians. 18 U.S.C. § 1153.

There is nothing to Oklahoma's claim that "new [federal] responsibilities" will "overwhelm current resources." Pet. 19. Citing the United States' *en banc* brief, Oklahoma hypothesizes a "tenfold increase" in

Oklahoma's Northern and Eastern Districts. *Id.* But that figure has no support. Those offices filed 205 criminal cases in fiscal 2016, so a tenfold increase would mean 2,000 cases.[10] In 2015, U.S. Attorney's offices prosecuted or declined to prosecute 2,655 Indian country matters *nationwide*.[11] Oklahoma's figure thus requires believing that Indians on the Creek reservation will commit crimes at a vastly higher rate than Indians nationwide. Even the United States, having casually asserted that figure below, has now abandoned it. U.S. Br. 21. Instead, the United States offers a new back-of-the-envelope calculation, U.S. Br. 21 n.7; but that figure has no more credibility than the unsupported and now-discarded calculation it asked the Tenth Circuit to believe. Indeed, the United States' claims should sound familiar. When Oklahoma courts reversed *Nowabbi*, the federal government complained that the decision affected "413,000 acres" and if "the United States [were] required to exercise jurisdiction," "[l]aw enforcement would be rendered very difficult." Br. for United States as *Amicus Curiae* Supporting Petitioner at 13, *Oklahoma v. Brooks*, 490 U.S. 1031 (No. 88-1147), http://www.justice.gov/sites/default/files/osg/briefs/1988/01/01/sg880200.txt. This Court denied certiorari, and the government's dire predictions proved unfounded.[12]

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[10] Dep't of Justice, U.S. Attorneys' Annual Statistical Report, Fiscal Year 2016, at 3 Table 1, http://bit.ly/2FFlOvk.

[11] Dep't of Justice, Indian Country Investigations and Prosecutions, 2015, at 4, http://bit.ly/2HRC11e.

[12] A Creek Nation prosecutor is already deputized as a Special

Oklahoma likewise overstates its claims of "disruption ... extend[ing] into the civil arena." Pet. 22-23 (citation omitted). With narrow exceptions, tribal efforts to regulate nonmembers are "invalid," even within reservations. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quotation marks omitted). Even where tribes would otherwise have regulatory power, "equitable considerations of laches and acquiescence may curtail ... [t]rib[al] power to" regulate after a "century-long" period of state jurisdiction. *Parker*, 136 S. Ct. at 1082; *see City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-21 (2005).

Indeed, there is no real risk of disruption. Congress can and will address any genuine issues. Already, the statute books are filled with Oklahoma-specific Indian laws.[13] Consider the "federal environmental statutes" Oklahoma invokes. Pet. 19. Tribes can administer some federal environmental programs in Indian country, but Congress gave Oklahoma—uniquely—a veto to allow Oklahoma to administer its generally applicable State programs in Indian country. *See* Safe, Accountable,

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Assistant U.S. Attorney, and more can be added. *See* Creek Reh'g Amicus Br. at 4-5; Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* 73 (2013) (such prosecutors are "key assets"), http://bit.ly/2CqYcvD.

[13] *See, e.g.*, 25 U.S.C. §§ 5201-5210 (Chapter 45A of Title 25 entitled "Oklahoma Indian Welfare"); *Cohen's Handbook of Federal Indian Law* § 4.07[1][c][ii], at 307-08 (enumerating Oklahoma-specific laws for "statutes of limitations, wills, heirship, probate and estate administration, guardianship, and partition").

Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005, Pub. L. No. 109–59, § 10211(a)-(b), 119 Stat. 1144, 1937.

Moreover, a congressionally sanctioned option *already* exists for Oklahoma to address any practical consequences arising from the decision below. Under Public Law 280, Oklahoma can gain "limited civil and broad criminal jurisdiction" in the Creek Nation's "Indian country," by agreement with the Nation. *Indian Country*, 829 F.2d at 980; *see* 18 U.S.C § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360. Oklahoma does not acknowledge this possibility, and this Court should not credit Oklahoma's effect-based arguments when it has not fully explored steps within its power.

IV. The Court should not grant certiorari on the question presented by the United States.

In no event should the Court grant the United States' second Question Presented. As noted, that issue was not presented to the Tenth Circuit or in the Petition, and it is now waived. Moreover, the United States is simply trying to bypass the usual certiorari process by raising in an uninvited amicus brief an issue this Court has repeatedly deemed unworthy of review after Oklahoma's state and federal courts rejected the United States' position. *See United States v. Sands*, 968 F.2d 1058, 1061-63 (10th Cir. 1992) (U.S. position "frequently raised, but never accepted"), *cert. denied*, 506 U.S. 1056 (1993); *State v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1031 (1989); *see also Cravatt v. State*, 825 P.2d 277, 279 (Okla Crim. App. 1992) ("no foundation for ... position," which "has been previously rejected by the courts of this State"). While the United

States suggests that these cases are different because they involve allotments, U.S. Br. 20, nothing in its theory provides for allotments to be treated differently from the reservation land at issue here. *See* U.S. Br. 19. In any event, the government's resort to pure *ipse dixit* as it tries to distinguish this mound of adverse precedent just underscores that introducing a new question presented at this stage of the litigation is entirely inappropriate.

CONCLUSION

The petition should be denied.

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Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Pursuant to Supreme Court Rules 21, 28.4, and 28.7, Respondent Patrick Dwayne Murphy and Amicus Curiae Muscogee (Creek) Nation ("Nation" or "Creek Nation") respectfully move that the Creek Nation be granted leave to participate in oral argument as amicus curiae supporting Respondent and that the Nation be allowed 10 minutes of argument time. The Nation has submitted an amicus brief in support of Respondent and seeks to present oral argument, as it did in the court of appeals, on an issue of paramount importance to it – the continued existence of the Nation's Reservation. Respondent has agreed to cede 10 minutes of argument time

to the Nation. Accordingly, no enlargement of the time allotted for this case would be required.

1. As it comes to the Court, this case presents a single question: whether Congress has disestablished the Creek Nation's treaty-guaranteed Reservation. Pet. Br. i; Resp. Br. i, 57-59. The court of appeals concluded that Congress has never done so – and thus that Respondent, a citizen of the Nation, should have been prosecuted by the United States rather than Oklahoma for his crime of murdering another Nation citizen within the Reservation boundaries. Pet. App. 7a-8a; *see* 18 U.S.C. §§ 1151, 1153(a) (providing for exclusive jurisdiction in the United States for the prosecution of murder when committed by an Indian within Indian country, defined to include reservations).

2. The status of the Creek Reservation is of critical importance to the Creek Nation for reasons going well beyond this case.

3. The Nation is the fourth most populous Indian nation in the United States. Tens of thousands of Creek citizens reside throughout the Reservation, which has been the Nation's homeland for nearly 200 years. Creek Nation departments and agencies deliver critical governmental services – including law enforcement, health care, education, prenatal and infant care, transportation, and family violence prevention – throughout the Reservation to both Indians and non-Indians. In doing so, the Nation has entered into dozens of cooperative agreements with state, county, and municipal governments in order to facilitate the provision of services to underserved communities, and the quality and importance of its efforts are routinely

recognized by its governmental counterparts. The Nation's governmental presence throughout the Reservation is an important predicate of those agreements, and key to the services that it provides.

4. In this Court, Petitioner mounts an all-out assault on the Nation's Reservation and in doing so attempts to rewrite the Nation's history. Where treaties between the United States and the Creek Nation set apart lands in the Indian Territory for the Nation and defined their boundaries in the classic manner of establishing a reservation – and where subsequent treaties and statutes consistently referenced a Creek Reservation – Petitioner nevertheless claims that the Nation did not enjoy a reservation there to begin with. Where Congress, pursuant to negotiated agreements with the Nation, allotted reservation lands amongst Creek citizens to fulfill the treaty purposes and expressly preserved the Nation's legislative authority over the Reservation, Petitioner nevertheless claims the treaties were abrogated and the Nation's jurisdiction abolished. Where Congress expressly continued the Creek Nation's existence and its governmental authority, the State would have this Court infer the opposite. And where Congress expressly provided that Statehood would not compromise the rights of Indians in their lands, the State would again have this Court disregard Congress's words and deem the boundaries of the Creek Reservation "evaporated." Pet. Br. 27.

5. The Nation is uniquely positioned to address these arguments. Each of Petitioner's claims contradicts the text and underlying history of treaties and other agreements negotiated by the Nation and the United States, and of statutes enacted

by Congress concerning the Creek. The Nation has an intimate familiarity with these foundational authorities and their history – a familiarity forged in the crucible of constant battle first to survive and then to flourish anew as a government – and has a strong sovereign interest in countering Petitioner's atextual and ahistorical narrative with its own informed understanding.

6. The Nation is likewise uniquely positioned to address Petitioner's claim that an affirmance will render Oklahoma a "second-class State." Pet. for Cert. 34. As noted, and Petitioner's litigation rhetoric aside, the Nation works in close cooperation with State, county, and municipal governments to provide effective governmental services throughout the Reservation, including in rural areas that would be drastically underserved were it not for the Nation's efforts. The working relationships with neighboring governments are often reflected in cooperative agreements, and a shared understanding that the Nation enjoys a measure of governmental authority throughout its Reservation is an important predicate for that cooperation. The Nation has a strong sovereign interest in addressing Petitioner's efforts to undermine that understanding.

7. The Nation can also convey to the Court its understanding of the limitations (borne both of congressional enactments and this Court's decisions) that constrain its authority over non-Indians on fee lands within the Reservation, limitations that expose as hyperbole the claims of Petitioner and his amici regarding the consequences that will follow from an affirmance. The Nation has operated for many years within the framework established by Congress and this Court to provide

effective governmental services to its citizens and non-citizens within the Reservation, and again has a strong sovereign interest in addressing these issues should they arise at argument.

8. In sum, the Creek Nation has an unusually direct and significant interest in the resolution of this case and is uniquely positioned to address issues raised by the question presented.

9. The importance of the Creek Nation's participation in this litigation, including at oral argument, was recognized in the proceedings below. The court of appeals granted the Nation's motion for expanded briefing limits and allowed it to present ten minutes of oral argument in addition to Mr. Murphy's allotted time. *See* Doc. No. 01019666915 (Aug. 3, 2016); Doc. No. 01019765949 (Feb. 15, 2017). The State also viewed the Nation's perspective as central, requesting and receiving expanded briefing limits and time expressly to respond to the Nation's amicus brief. *See* Doc. No. 01019691522 (Sept. 20, 2016); Doc. No. 01019699241 (Oct. 3, 2016). The court of appeals' decision likewise reflects the significance of the Nation's participation, as the Court extensively analyzed historical materials and arguments presented by the Nation in arriving at its decision. Pet. App. 105a, 114a-132a.

10. The United States has filed a brief as amicus curiae in support of Petitioner and has sought leave to participate in oral argument and to divide time with Petitioner's counsel. If this Court follows its usual practice and allows the United States to argue in support of Petitioner, that would provide an additional, compelling reason to hear from the Creek Nation. The United States and the Nation

are the two signatories to the key treaties at issue here, and likewise engaged in the intensive negotiations culminating in the Creek Allotment Act of 1901, ch. 676, 31 Stat. 861. If the United States is to present its understanding of those agreements at argument, fairness requires that the Nation should be allowed to do the same. Respondent and the Nation respectfully submit that granting divided argument on both sides, and thus allowing all three directly interested sovereign governments to participate, will best ensure a full presentation of issues going to the very heart of the Nation's history, identity, and continuing governmental authority.

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CAPITAL CASE

REPLY BRIEF

Oklahoma stands on the brink of the most radical jurisdictional shift since statehood. The United States took the unusual step of urging review without this Court's invitation—for good reason. The State could lose jurisdiction over all crimes involving Native Americans in the eastern half of the State, with a corresponding burden on federal and tribal authorities. Extended to the entire former Indian Territory, the decision below would increase the total amount of reservation land nationwide by 28.3% and *triple* the total population of reservations in the United States. America's largest city on a reservation would no longer be Fife, Washington, population: 9,173; it would be Tulsa, Oklahoma, population: 403,090. Federal and state courts would face challenges to hundreds, if not thousands, of existing criminal convictions—as well as decades of litigation over who has civil and regulatory jurisdiction in eastern Oklahoma.

I. The question presented is important

The sudden and monumental impacts of the decision below are impossible to ignore.

1. Respondent does not dispute that the region at stake—the historical boundaries of the Creek Nation alone—is massive in population and area. Pet. 15-18. Although respondent argues (at 32) that the decision below does not "compel[] the same result" for the other Five Tribes, he offers not *one* distinction that would prevent that outcome. Pet. 17-18. Respondent references broader Five Tribes history when he perceives it beneficial. Opp. 22, 27-28. And other tribes and tribal members have relied on *Murphy* to attack

prior convictions, oppose state criminal jurisdiction, or assert tribal jurisdiction. Pet. 21-23.[1]

Respondent observes (at 31) that the territory in *Solem* covered 1.6 million acres. But the former Indian Territory is nearly *twelve* times as large, covering over 19 million acres. Pet. 16-17. The population of the Cheyenne River Sioux Reservation in *Solem* is 8,090—just 0.45% of the 1.8 million residents of the former Indian Territory, and a fraction of the 750,000 people residing today within the Creek historical boundaries alone. Census Bureau, *Interactive Population Map*, https://goo.gl/YF8sb8.

2. The decision below conflicts with the determination of the State's highest criminal court. Pet. 13; U.S. Br. 3-4. Even without such a split, this Court has granted certiorari in disestablishment cases with consequences that pale in comparison. The federal government filed an uninvited amicus brief to emphasize the "radical[] shift" in criminal jurisdiction and projects a "massive increase" in federal law-enforcement responsibilities. U.S. Br. 5, 21-22. Contrary to respondent's suggestion (at 33-34), the inevitable swell in the federal caseload does not presume that Indians in the historical Creek territory commit crimes (or are victims) at a higher rate. Federal indictments would surge because the decision below increases Oklahoma's Indian Country population by orders of magnitude, and sweeps into federal jurisdiction the City of Tulsa—the city with the State's

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[1] The petition notes that the Cherokee Nation cited *Murphy* to assert tribal jurisdiction over non-Indian-owned pharmaceutical companies. Pet. 23. The Cherokee Nation originally invoked tribal jurisdiction on other grounds, *see* Opp. 32, but changed its legal theory to rely on *Murphy* immediately following the Tenth Circuit's decision.

highest incidence of violent crime. Fed. Bureau of Investigation, *January–June Preliminary Semiannual Uniform Crime Report* tbl.4 (2017), https://goo.gl/mLXrkm.

Respondent asserts (at 13) that "Creek law enforcement is formidable." But the Creek Nation's police department predicts a roughly five-fold increase in personnel to police the territory. Jason Salsman, *Increased LTPD jurisdictional duties at the heart of Murphy decision*, Mvskokemedia.com (Dec. 15, 2017), https://goo.gl/k7GG5P. Just one tribal judge presides over *all* civil and criminal cases in the Creek Nation's courts. District Court, Muscogee (Creek) Nation, https://goo.gl/MJYKnw. And the Creek Nation's Supreme Court last issued an opinion in 2015. Supreme Court, Muscogee (Creek) Nation, Orders and Opinions, https://goo.gl/YDQF8r.

3. Respondent contends (at 33) that procedural obstacles to collateral review may mitigate the disruption to state convictions. That is ironic given that respondent himself recently obtained federal habeas relief for the capital murder he committed in 1999.[2] Respondent's speculation is also cold comfort to a State facing 61 collateral attacks and 13 direct appeals *so far* invoking *Murphy*. Pet. 21. And few, if any, procedural barriers preclude *state* post-conviction relief on jurisdictional grounds. Pet. App. 13a-14a n.5. Regardless, the decision below would precipitate years of state and federal post-conviction litigation.

Respondent argues (at 31-32) that this Court should deny certiorari based on the United States'

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[2] That this appeal arose in the AEDPA context is not a reason to postpone review, Opp. 20 n.5, but rather underscores the broad ramifications of the question presented.

secondary argument that, even assuming a Creek reservation, Congress independently left criminal jurisdiction over Indian Country with the State. *See* U.S. Br. 15-20. But respondent then declares that argument unmeritorious and foreclosed by the Tenth Circuit with respect to allotments. Opp. 31, 36-37. Respondent's contradictory arguments only highlight the intolerable uncertainty over who has authority to prosecute criminal offenses in eastern Oklahoma, which will persist unless the decision below is reversed. That state of affairs is unsurprisingly acceptable to respondent because he would not bear the brunt of the jurisdictional tsunami created by the decision below—his capital sentence will be vacated, leaving the state and federal government to pick up the pieces.

Nor would the United States' secondary argument resolve the civil and regulatory implications of the decision below. Litigation over these issues would mire courts for decades. Pet. 19-20; Envtl. Fed'n of Okla. Br. 8-12. Meanwhile, farmers, ranchers, and other businesses would face "significant risk and uncertainty" in areas ranging from taxation to construction permits. Envtl. Fed'n of Okla. Br. 6-13; OIPA Br. 5-15.

It is no answer that "Congress can and will address" the chaos. Opp. 35. Rank speculation that Congress may act someday has never been a reason to deny certiorari. And it is hardly "within [Oklahoma's] power," Opp. 36, to assume jurisdiction under Public Law 280. That law requires the *Creek Nation* to consent to State jurisdiction and to obtain the agreement of a majority of all enrolled Indians in the area. 25 U.S.C. §§ 1321, 1326. To our knowledge, no tribe has ever voluntarily consented under Public Law 280, and the Creek Nation's amicus brief below

strenuously argued *against* state jurisdiction. Pet. App. 22a.

II. This case presents a clean and timely vehicle

Whether the Creek Nation's 1866 boundaries constitute an Indian reservation today is squarely presented, outcome determinative, and ripe for this Court's resolution.

Respondent accuses the State (at i, 18-20) of pressing an argument that was waived and never passed on—that this Court should "revisit" *Solem*. That is a gross mischaracterization. The petition merely restates Chief Judge Tymkovich's concurrence that this case warrants certiorari because the panel considered itself bound by *Solem*, despite differences in context. Pet. 3 (citing App. 232a). The State's "reference to *Solem*[]" below is not waiver. Opp. 19. The State's position remains the same: *Solem*'s three-factor analysis—especially the specific textual indicia the Court deemed characteristic of disestablishment—is ill-suited to Oklahoma's unique history. Okla. C.A. Br. 45-47, 57 & n.18, 94; Pet. 30-31. *Solem* is materially distinguishable and addresses surplus land acts. Okla. C.A. Br. 90-91; Pet. 29-30. But even under *Solem*, Congress disestablished the 1866 Creek borders. Okla. C.A. Br. 56-94; Pet. 31-34.

Respondent argues (at 25) that review is "unwarranted given *Parker*'s recent application of *Solem*." But this case is hardly some one-off application of *Solem*. The decision below threatens to cleave Oklahoma in two. Furthermore, *Parker* too involves a surplus land act and is no more relevant than *Solem*. Pet. 31; U.S. Br. 5. In any event, recent consideration of another case about an Indian reservation is no basis to deny review when otherwise warranted.

III. The decision below is wrong

Given the importance of this case, review is warranted independent of the merits. Regardless, the decision below is wrong.

1. Respondent's suggestion (at 25) that Oklahoma agrees that the Tenth Circuit correctly applied *Solem* to the facts here (assuming *Solem* applies) is puzzling. The petition devotes an entire section to attacking the Tenth Circuit's "flawed" application of *Solem*. Pet. 31-34. Also strange is respondent's suggestion (at 23) that the State rejects reliance on statutory text. The petition argues that, although no statute uses particular disestablishment terms traditionally found in surplus land acts, this case does not involve a surplus land act. Pet. 24; U.S. Br. 5-6. And an avalanche of *other* statutory text reflects unmistakable congressional intent to eliminate the historical boundaries of the Five Tribes to create the State of Oklahoma.

Respondent has no response to the State's observation that statute after statute stripped the tribes of any vestige of sovereignty associated with reservation status. Pet. 24-26. The Creek Nation at the end of this era exercised no independent sovereign functions besides signing deeds for allotment. Pet. 25. Respondent's assertion (at 9) that the Five Tribes Act "expressly disavow[ed] tribal dissolution" ignores the litany of its provisions that reduced the tribal governments' role to winding up their affairs. Pet. 25.

Contrary to respondent's suggestion (at 28), the Enabling Act's reference to "territory *now* constituting the Cherokee, Creek, and Seminole nations" (emphasis added) is consistent with the notion that the territory was being transformed into a State. *Carcieri v. Salazar*, 555 U.S. 379, 388-89 (2009) (inter-

preting similar temporal language). Likewise, that the Creek allotment agreements defined federal responsibilities for grazing licenses and taxes, mineral leases, and liquor laws by reference to the then-extant "Creek Nation," Opp. at 8, 27, does not prove the entire area would be a reservation post-statehood. Nor did Congress opaquely recognize reservation status in 1906 by referencing the "west boundary line of the Creek Nation." Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364. Tribal boundaries remained relevant for purposes of allotment, which continued post-statehood. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 151 (1999). The Act resolved a boundary issue that had complicated allotment along the Creek territory's western edge. Mary Jane Warde, *George Washington Grayson and the Creek Nation, 1843-1920*, at 123, 243-44 (1999).

2. Respondent disavows "magic words," Opp. 16, but nevertheless harps (at 7, 24, 26) on the absence of "hallmark diminishment language" of "cession," "compensat[ion]," or return of lands to "the public domain." Respondent's invocation (at 6) of the Creeks' prior cessions of territory to the United States and the Seminoles ignores the distinction between (1) the conveyance of land to another sovereign by treaty and (2) the creation of a State by dissolution of communal land tenure in fee via allotment to individual members. Language of "cession"—or "lump sum payments" by Congress, much less restoration of land to the "public domain"—would have been unnecessary. Pet. 31; U.S. Br. 15.

Pointing to the Creeks' previous agreements to cede land, respondent asserts that the Creeks negotiated to ensure that the 1901 allotment agreement would avoid language of cession or disestablishment

in order to preserve sovereign boundaries. Opp. 7, 24-26. But by 1901, Congress and the Creeks were not negotiating over boundaries within which the Tribe could live in seclusion; nor were they debating opening parcels of Indian Territory to non-Indian settlement. Rather, the 1901 Agreement was one step in a larger congressional scheme to destroy the Five Tribes' sovereignty and boundaries to allow for Oklahoma's creation; destruction and creation were two sides of the same coin. Pet. 4-12, 24-26, 29-31. Indeed, in the very 1901 agreement respondent touts as preserving the Creek Nation, the Tribe agreed to its own dissolution. § 46, ch. 676, 31 Stat. 861, 872. Regardless, it defies credulity that Creek officials anticipated that particular words of cession might acquire jurisprudential significance half a century later. *See Solem*, 465 U.S. at 468. With respect to the Five Tribes, cession and allotment were alternative means to the same end: statehood. Pet. 7, 10, 33.

Respondent claims (at 4-6, 22-24) that Oklahoma statehood is just another unremarkable chapter of the "Allotment Era." But the General Allotment Act exempted the Five Tribes, Pet. 30, and Congress has since treated the Indians of Oklahoma differently, Opp. 35 & n.13; *see also, e.g.*, 25 U.S.C. § 2719(a)(2). Allotment of the Five Tribes' territories was "similar in name though different in nature," such that "there is no precedent or standard in this or any other country by which to judge of the peculiar task that Congress undertook." H.R. Doc. No. 5, 58th Cong., 3d Sess. 3 (1904).

3. Respondent is incorrect (at 9-10, 27-28) that courts and Congress reaffirmed the Five Tribes' authority. Respondent cobbles together snippets from *pre*-statehood cases, *e.g.*, *Morris v. Hitchcock*, 194 U.S. 384 (1904), to assert that Congress permitted the

tribes to continue to exercise legislative power within their borders. But Congress later abolished tribal taxes and eventually eliminated the tribes' independent legislative authority. Five Tribes Act, § 11, 34 Stat. at 141.

Nor does *U.S. Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911), recognize any reservation within the 1866 boundaries. Opp. 11, 28. That case held that 3,000,000 acres of land *yet to be allotted* remained Indian Country under federal liquor laws. 191 F. at 678-79. If anything, *Friedman* proves our point: whether land remained unallotted would have been irrelevant were the entire area a reservation and therefore Indian Country subject to federal liquor laws. Likewise, the decades-long debate over whether the State has criminal jurisdiction over restricted allotments in the former Indian Territory, *e.g.*, *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936), would have been moot were the tribes' historical boundaries reservations. Concerns about "checkerboard" jurisdiction would have been purely academic if the entire area, as a reservation, were uniformly Indian Country. *United States v. Sands*, 968 F.2d 1058, 1062-63 (10th Cir. 1992).

4. Another powerful indicator of disestablishment is Congress's decision to transfer to the State jurisdiction over Indians for nonfederal crimes committed in the former Indian Territory. Pet. 26-29. Respondent has no response other than to surmise (at 28-29 n.7) that Oklahoma illegally exercised jurisdiction over tens of thousands of cases for the last century. But immediately upon statehood, the federal territorial courts themselves transferred Indian defendants to state courts rather than to the new federal district courts. Pet. 27-28 & nn.5-6; U.S. Br. 16-17. The United States told this Court in *Hendrix v.*

United States, 219 U.S. 79 (1911), that Congress withdrew Indian Territory from exclusive federal jurisdiction, and this Court apparently agreed. Pet. 28. Respondent offers silence. Respondent identifies no case—from statehood to today—where federal authorities prosecuted an Indian based on the premise that the former Indian Territory was a reservation. The State, after scouring federal and state court records, has found no such case.

The existence of reservations following statehood would have left an inexplicable jurisdictional gap for the vast majority of Indian-on-Indian crimes. Pet 28-29; U.S. Br. 18. Respondent (at 30 n.8) points to the federal territorial courts' jurisdiction but ignores that the Enabling Act abolished those courts. Pet. 26. Respondent's quotation (at 30 n.8) from *United States v. Ramsey*, 271 U.S. 467 (1926), is a red herring. *Ramsey* concerned an offense by non-Indians on an Osage allotment, outside the former Indian Territory, over which the General Crimes Act conferred federal jurisdiction; the case says nothing about Indian-on-Indian crimes, *i.e.*, the gap that would have existed if the decision below were correct.

Respondent's suggestion (at 30 n.8) that the Bureau of Indian Affairs could have closed the jurisdictional gap by establishing Courts of Indian Offenses is baffling. The fact that the BIA could have established such courts *but did not* only proves the State's point: the federal government saw no gap to close because no reservations existed. Moreover, the Courts of Indian Offenses had nothing to do with general criminal jurisdiction. These "courts" were "mere educational and disciplinary instrumentalities," *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888), with narrow jurisdiction over practices considered "heathen and barbarous," such as the sun dance, which

were criminalized to "destroy the tribal relations as fast as possible." Comm'r of Indian Affairs, *Annual Report* xxi (1885); *see* Dep't of Interior, Regulations of the Indian Office Effective April 1, 1904 § 584.

5. Respondent offers no response to Congress's post-statehood enactments that lifted restrictions on allotment and dissolved tribal affairs. Pet. 33-34. Instead, respondent asserts (at 29) that Congress and the courts continued to recognize a Creek "reservation." The statutes and cases on which respondent relies do not support that proposition. *Supra* pp. 6-9. And the fact that a Creek "reservation" appeared on maps after statehood proves nothing. Those maps also show the former Osage reservation, which was disestablished in preparation for statehood. *See Osage Nation v. Irby*, 597 F.3d 1117, 1127 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011). Since the Administration of Theodore Roosevelt, the Executive Branch has never wavered in its position that no reservations exist in the former Indian Territory. Pet. 28; U.S. Br. 13-14, 19 n.5. Likewise, "Oklahoma after statehood [has] asserted absolute criminal and civil jurisdiction." Opp. 4.

The restoration of tribal government after the 1936 Oklahoma Indian Welfare Act, *see* Opp. 12-14, 29-30, is irrelevant. The Creek Constitution, adopted in 1979 and approved by the Secretary of the Interior (not by Congress, as respondent states, Opp. 12), merely asserts "political jurisdiction" coextensive with the Creek Nation's historical boundaries. Creek Const. art. I § 2. But the Creeks' self-described "political" authority in recent decades does not reverse Congress's disestablishment of their former territory on the path to statehood.

Finally, respondent's contention (at 29) that the State "[m]ostly ... relies on *Solem*'s third factor" is wrong. Rather, the region's subsequent history and demographics corroborate Congress's intent to dismantle the Five Tribes' territories. Pet. 33-34. Today, Oklahoma exists as Congress envisioned: a unified community of Oklahomans. Unless this Court intervenes, the decision below threatens to resurrect Oklahoma's pre-statehood status as two Territories rather than one State, undoing Congress's promise to the people of Oklahoma over a century ago.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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April 23, 2018

No. 17-1107

In the Supreme Court of the United States

TERRY ROYAL, WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Oklahoma has criminal jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Nation member committed within the Nation's historic territory because (1) Congress disestablished the original territory of the Creek Nation such that respondent's crime did not occur within "Indian country" as defined in 18 U.S.C. 1151(a), or (2) if that territory was not disestablished, Congress nevertheless conferred criminal jurisdiction on Oklahoma without regard to whether the crime occurred within "Indian country."

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(A)

Counsel of record received timely notice of the United States' intent to file this amicus brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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In the Supreme Court of the United States

No. 17-1107

TERRY ROYAL, WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The court of appeals held that the State of Oklahoma lacks jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Creek member in the Nation's former territory because that former territory constitutes a present-day "reservation" and therefore is "Indian country" under 18 U.S.C. 1151(a). That decision means that the federal government, rather than the State, must investigate and prosecute crimes committed by or against Indians within the Creek Nation's former national domain, which encompasses over three million acres in eastern Oklahoma, including most of the City of Tulsa. In light of the federal government's substantial interest in the

question presented, the United States supported Oklahoma's petition for rehearing en banc in the court of appeals.

STATEMENT

1. Federal law defines "Indian country" to include "land within the limits of any Indian reservation under the jurisdiction of the United States." 18 U.S.C. 1151(a).[1] "Criminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citation omitted). Unless Congress has determined otherwise, the federal government generally exercises jurisdiction over crimes committed by or against an Indian in Indian country. See 18 U.S.C. 1152. Offenses by one Indian against the person or property of another within Indian country "typically are subject to the jurisdiction of the concerned Indian Tribe," *Negonsett*, 507 U.S. at 102; see 18 U.S.C. 1152 ¶ 2, but the Indian Major Crimes Act, ch. 341, 23 Stat. 385 (18 U.S.C. 1153(a) (Supp. I 2013)), gives the federal government jurisdiction over certain serious offenses—such as murder, kidnapping, burglary, and robbery—between Indians. Absent an Act of Congress to the contrary, federal jurisdiction is ordinarily exclusive of the State. The State generally has jurisdiction only over those state-law crimes committed by non-Indians against other non-Indians and over victimless crimes committed by non-Indians. See generally *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

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[1] "Indian country" also includes "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(b) and (c). Those definitions are not at issue here. See Pet. App. 17a & n.10.

2. a. Respondent is a member of the Creek Nation. He was convicted in Oklahoma state court of first-degree murder of another member of the Creek Nation, and was sentenced to death. His conviction was affirmed on appeal. 47 P.3d at 877-880, 888.

In his second application for state post-conviction relief, respondent argued that the federal government had exclusive jurisdiction over his crime because he and the victim were Indians and the crime occurred in Indian country.[2] The Oklahoma Court of Criminal Appeals rejected that argument and affirmed respondent's conviction. Pet. App. 203a, 222a-224a. Respondent sought this Court's review, and in response to the Court's invitation, the United States filed a brief stating its position that Congress extinguished the historic territory of the Creek Nation. U.S. Amicus Br. at 15-20, *Murphy* v. *Oklahoma* (No. 05-10787). This Court denied certiorari. *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007).

b. Respondent sought relief in federal court pursuant to 28 U.S.C. 2254. Pet. App. 135a. The district court denied the petition, concluding that "[a] careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished." *Id.* at 192a.

c. The Tenth Circuit reversed. Pet. App. 1a-133a. Applying the three-part framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court held that federal law clearly established that respondent's crime occurred in Indian country—and was subject to exclusive

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[2] Respondent would not be subject to the death penalty in a federal prosecution. See 18 U.S.C. 3598.

federal jurisdiction—because Congress never disestablished the exterior boundaries of the Creek Nation. Pet. App. 78a-133a. In the court's view, the statutes through which Congress allotted the Creek Nation's lands, abolished its courts, and extended the laws of the new State of Oklahoma over the former Indian Territory included none of the "hallmark[]" language present in prior cases finding disestablishment. *Id.* at 96a. The court further reasoned that the historical context and Congress's subsequent treatment of the land could not "overcome the absence of statutory text." *Id.* at 132a; see *id.* at 119a. The court therefore set aside respondent's conviction. *Id.* at 133a.

d. The court of appeals denied the State's petition for rehearing en banc. Pet. App. 228a-229a. Chief Judge Tymkovich concurred, "suggest[ing] this case might benefit from further attention by" this Court. *Id.* at 230a.

DISCUSSION

The court of appeals' holding that Oklahoma lacked jurisdiction over respondent's crime is incorrect, conflicts with the decision of the Oklahoma Court of Criminal Appeals in respondent's case, and is extraordinarily important. Contrary to the court's view, Congress disestablished the Creek Nation's historic territory when, in preparation for and granting Oklahoma statehood, it broke up and allotted the Creek Nation's lands, displaced tribal jurisdiction, and provided for application of state law and state jurisdiction. There accordingly is no present-day Creek reservation. In any event, the enactment of the definition of "Indian country" in Section 1151 in 1948 did not repeal Congress's prior grant of jurisdiction to the State to prosecute crimes involving

Indians in the former Indian Territory. If left uncorrected, the decision below will radically shift criminal jurisdiction in cases involving Indians in vast areas of eastern Oklahoma from the State to the federal government, and affect state taxing and other jurisdiction. This Court's review is warranted.

A. Congress Disestablished The Creek Nation's Original Territory

This Court's prior disestablishment cases have considered whether Congress disestablished or diminished a particular reservation through "surplus lands Acts" that opened land to non-Indian settlement. *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). In that context, the Court's cases provide "a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470. The Court considers the language and purpose of the relevant Acts of Congress, the historical context in which they were passed, and the subsequent treatment of the relevant lands. *Id.* at 470-472; see also, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998); *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994).

While those same general principles are relevant here and support disestablishment, this case is also distinct from those the Court has considered before. From the late 19th century through Oklahoma statehood, Congress sought to create a new State encompassing the Oklahoma Territory and Indian Territory. Congress pursued that goal through a series of statutes that provided for the dissolution of the tribal governments and disestablished the national domains of the "Five

Tribes" (the Creeks, Cherokees, Chickasaws, Choctaws, and Seminoles) that occupied the Indian Territory in eastern Oklahoma. Congress abolished the Creek Nation's courts, applied federal and state law to Indians and non-Indians alike in its original territory, provided for the allotment of almost all of its communal lands, and distributed tribal funds to individual Indians.

The court of appeals reached the wrong result because it asked the wrong question. Given the "unique history" of the Five Tribes, *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 970 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988), the critical inquiry is not whether the statutory language included the "hallmarks" found in prior cases, see Pet. App. 95a, 96a, 107a, but rather whether Congress intended to disestablish the Creek Nation's territory as part of the creation of the State of Oklahoma. Cf. *Hagen*, 510 U.S. at 411 (rejecting a "clear-statement rule"). A series of congressional enactments, the unique historical context, and subsequent developments make clear that it did.

1. a. In the 1830s, the Creek Nation was removed from its homeland in the southeastern United States to the then-unsettled region west of Arkansas, in current-day Oklahoma. Unlike many other tribes (including those involved in *Solem* and its progeny), the Creek Nation did not receive or retain its territory as a traditional reservation, but rather was granted it in fee, with the right of perpetual self-government. See *Woodward* v. *de Graffenried*, 238 U.S. 284, 293-294 (1915); *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436-437 (1897); *Cohen's Handbook of Federal Indian Law* § 4.07[1][a], at 289 (Nell Jessup Newton et al. eds., 2012 ed.) (Cohen 2012). After the Civil War, the Creek Nation ceded the

western portion of its territory, but retained title to the eastern portion and the right to self-government. Treaty with the Creek Nation of Indians, June 14, 1866, arts. III, X, 14 Stat. 786-789.

Over time, law enforcement in the Indian Territory became difficult because tribal courts did not have criminal jurisdiction over the increasing non-Indian population. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978). In the Act of May 2, 1890 (1890 Act), ch. 182, 26 Stat. 81, Congress responded by establishing the Territory of Oklahoma in the western portion of the Indian Territory, which had been ceded by the Five Tribes. Ch. 182, §§ 2-28, 26 Stat. 81-93. Congress also expanded the jurisdiction of the United States Court for the Indian Territory, which had been established the previous year, to encompass all civil and criminal cases except those over which the tribal courts had exclusive jurisdiction because both parties were Indians, §§ 29, 31, 26 Stat. 93-94, 96. The 1890 Act further provided that the laws of the United States that prohibited crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were extended to the Indian Territory for offenses not governed by federal law. § 33, 26 Stat. 96-97.

b. In 1893, Congress established the Dawes Commission and authorized it to reach agreements with the Five Tribes to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645-646; see *Woodward*, 238 U.S. at 295. Congress envisioned

that to do so the agreements would "overthrow * * * the communal system of land ownership," and "extinguish[] the tribal titles, either by cession * * * or by allotment and division in severalty." *Woodward*, 238 U.S. at 294-295. The Creek Nation and the other Tribes proved reluctant to negotiate. To facilitate allotment, Congress authorized the Dawes Commission to determine citizenship in the Five Tribes, including the Creek Nation. Act of June 10, 1896, ch. 398, 29 Stat. 339-340. And due to the increasing non-Indian population, Congress declared that it was "the duty of the United States to establish a government in the Indian Territory" to "rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof." Ch. 398, 29 Stat. 340.

In 1897, Congress brought Indians in the Indian Territory under the same jurisdictional and substantive laws applicable to non-Indians. Congress vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (Indian Department Appropriations Act), ch. 3, 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The next year, Congress passed the Curtis Act, ch. 517, §§ 26, 28, 30 Stat. 504-505, which abolished tribal courts in the Indian Territory and banned the enforcement of tribal law in the United States courts there. Thus, congressional enactments "gradually came to the point where they displaced the tribal laws and put in

force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as [non-Indian] persons." *Marlin* v. *Lewallen*, 276 U.S. 58, 62 (1928).

c. In 1901, the Creek Nation and the United States entered into the Original Creek Agreement. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. It provided for the termination of the Creek Nation's government within five years and the allotment of almost all tribal lands. §§ 3, 6, 46, 31 Stat. 862-863, 872. For the period before dissolution, the Agreement substantially diminished the power of the tribal government. § 42, 31 Stat. 872. In 1902, a Supplemental Agreement provided that the statutes of Arkansas in effect in the Indian Territory were to govern the descent and distribution of allotments, Act of June 30, 1902, ch. 1323, § 6, 32 Stat. 501, and that all funds of the Creek Nation not needed to equalize the allotments' value were to be paid out on a per capita basis "on the dissolution of the Creek tribal government," § 14, 32 Stat. 503. The Original and Supplemental Creek Agreements thus "embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership." *Marlin*, 276 U.S. at 63. Congress continued that plan in 1904, confirming that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise*." Act of Apr. 28, 1904 (1904 Act), ch. 1824, § 2, 33 Stat. 573 (emphasis added).

d. Nearing completion of its project in 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five * * * Tribes in the Indian Territory." The Act

abolished tribal taxes and directed the Secretary of the Interior to assume control over the collection of all revenues accruing to the Tribes, to sell off any remaining unallotted lands, and (once all claims against a Tribe were paid) to distribute any remaining funds to tribal members on a per capita basis. §§ 11, 17, 28, 34 Stat. 141, 143-144, 148. The Secretary was directed to sell all buildings used for tribal purposes and to take over tribal schools until territorial or state schools were established. §§ 10, 15, 34 Stat. 140-141, 143. Due to delays in the allotment and enrollment processes, the Act extended the tribal governments "until otherwise provided by law." § 28, 34 Stat. 148. But Congress made clear that it continued to intend "dissolution" of the tribal governments. § 11, 34 Stat. 141. In the meantime, Congress prohibited the tribal governments from sitting for more than 30 days per year, barred them from enacting legislation or entering certain contracts without presidential approval, and gave the Secretary authority to replace the principal chief in certain circumstances. §§ 6, 28, 34 Stat. 139, 148.

e. Finally, Congress passed the Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, which authorized the creation of a new State out of the Oklahoma and Indian Territories. The Enabling Act provided that cases arising under federal law that were pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. *Ibid.* All other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts of Oklahoma, the "successors" to the

United States courts in the Oklahoma and Indian Territories. §§ 16, 20, 34 Stat. 276, 277, as amended by Act of Mar. 4, 1907, ch. 2911, § 3, 34 Stat. 1286-1288; see *Southern Sur. Co.* v. *Oklahoma*, 241 U.S. 582, 586 (1916). That included cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons. But the Enabling Act extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278.

f. This statutory history demonstrates that Congress disestablished the Creek Nation's territory and largely stripped its governmental authority. In contrast to this Court's prior cases finding a continuing reservation, Congress did not merely open the Creek Nation's lands for settlement by non-Indians and make the proceeds available for the continuing benefit of the Tribe or its members. *E.g.*, *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016); *Solem*, 465 U.S. at 474-475; *Mattz* v. *Arnett*, 412 U.S. 481, 495-496 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-356 (1962). Instead, Congress broke up the Creek Nation's domain, substituting individual for communal ownership and distributing the proceeds to individual Indians. Congress also eliminated the Creek Nation's tribal courts and provided for the dissolution of the tribal government, divestment of tribal property, and distribution of tribal funds. These actions demonstrate that Congress did not intend for the Creek Nation's historic lands to constitute a continuing reservation.

2. Indeed, Congress, the Dawes Commission, and the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's territory. See *Solem*, 465 U.S. at 471.

a. Congress concluded that the current system of communal land ownership and tribal government was a "complete failure." *Woodward*, 238 U.S. at 296-297. Congress therefore determined that change was "imperatively demanded" and required breaking up the Creek Nation's lands and "establish[ing] a government over [non-Indians] and Indians of [the Indian] Territory in accordance with the principles of our constitution and laws." S. Rep. No. 377, 53d Cong., 2d Sess. 12-13 (1894).

b. The Dawes Commission explained that Congress's goal was not simply to open Indian lands to non-Indian settlement, but rather to "clos[e] the history of these [Indian] nations" by "bring[ing] about such changes as would enable * * * the admission of [a new] State of the Union." H.R. Doc. No. 5, 56th Cong., 2d Sess. 162 (1900); Felix S. Cohen, *Handbook of Federal Indian Law* § 3, at 429-430 (1st ed. 1942); see also *Woodward*, 238 U.S. at 296. This goal required not only "the allotment of the land, * * * but also * * * the effacement of the tribal governments." H.R. Doc. No. 5, 59th Cong., 1st Sess. 224-225 (1905).

c. The Creek also recognized that Congress had proposed "disintegrating the land of our people," which would mean "the civil death of the Muscogee Nation" so that it could "be transformed into a State of the Union." Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897). The Creek sought simply to "preserve[] unimpaired" their "chief safeguard, the national title to the land patented to us," until they had negotiated an agreement to ensure that they were not "overwhelmed

by an alien and strange population at the first election" and then "robbed by State taxation" and "oppressed by discriminating laws" when "the [Creek] nation ceases." *Id.* at 1-2.

3. Subsequent events underscore that Congress disestablished the Creek Nation's original territory. See *Solem*, 465 U.S. at 471.

a. In the years following Oklahoma statehood, Congress enacted several statutes eliminating certain restrictions on the alienation of Creek allotments and subjecting restricted lands to state-court jurisdiction. *E.g.*, Act of May 27, 1908, ch. 199, 35 Stat. 312; Act of June 14, 1918, ch. 101, 40 Stat. 606; Act of Apr. 10, 1926, ch. 115, 44 Stat. 239-240; Act of Aug. 4, 1947, ch. 458, 61 Stat. 731. Those provisions underscore that Congress had no intention to preserve the entire Indian Territory—including even *unrestricted* lands—as federal Indian country.

Indeed, Congress recognized that the Five Tribes were not living on reservations. It excluded Oklahoma from the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq.*, because that Act "was more adapted to Indian[s] living on reservations, * * * and not Indians [in Oklahoma] residing on allotments." *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 9 (1935); see also S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (recognizing, in connection with the Oklahoma Indian Welfare Act, 25 U.S.C. 5201 *et seq.*, that "all Indian reservations as such have ceased to exist"). In a letter to the Attorney General in 1942, the Assistant Secretary of the Interior likewise opined that as a result of statutes culminating in the Enabling Act, the

"Indian reservations" in the "Indian Territory * * * ha[ve] lost their character as Indian country." App., *infra*, 4a. Subsequently, Congress has repeatedly defined "[r]eservation" for specific statutory purposes to encompass "*former* Indian reservations in Oklahoma." 25 U.S.C. 1452(d) (emphasis added).[3]

b. This Court's decisions underscore that the Creek Nation's historic territory does not constitute a "reservation" today. In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court noted that while some "Indian tribes [are] separate political entities with all the rights of independent status," that "condition * * * has not existed for many years in the State of Oklahoma." *Id.* at 602. Members of the Five Tribes, the Court explained, "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; see *id.* at 608-609; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973) (describing *Oklahoma Tax Commission* as a case in which Indians had "left the reservation and become assimilated into the general community.").[4]

4. The court of appeals therefore erred in holding that the Creek Nation's historic territory constitutes a present-day reservation. Reviewing the statutory text,

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[3] Accord, *e.g.*, 12 U.S.C. 4702(11); 25 U.S.C. 2020(d)(1) and (2), 3103(12), 3202(9); 29 U.S.C. 741(d) (Supp. II 2014); 33 U.S.C. 1377(c) (Supp. II 2014); 42 U.S.C. 2992c(2), 5318(n)(2); see also Cohen 2012 § 4.07[1][b], at 292 n.41.

[4] Demographic evidence further supports disestablishment. See *Parker*, 136 S. Ct. at 1078-1079, 1081-1082; *Solem*, 465 U.S. at 471. Even by 1906, "four-fifths of the inhabitants of the [Indian] Territory ha[d] no connection whatever with the tribes and [we]re [non-Indian] people." H.R. Rep. No. 496, 59th Cong., 1st Sess. 10 (1906).

the court unduly focused on the "traditional textual signs" and "hallmarks" that this Court has found telling in prior disestablishment cases. Pet. App. 59a, 102a; see *id.* 74a, 76a, 95a. But in the unique context of the Five Tribes and the creation of the State of Oklahoma—in which Congress did not merely open Indian lands to non-Indian settlement, but instead broke up the Creek Nation's domain, eliminated its courts, and provided for the dissolution of its government, the divestment of its property, and the distribution of its funds—it was unnecessary for Congress to use the words "lump sum payment" or "public domain," or provide for the tribe to "cede" land to the United States. *Id.* at 76a. Such verbal formulations would have been ill-suited to Congress's purpose and the way in which it chose to disestablish the Tribe's territory. The court of appeals also gave insufficient weight to the contemporaneous understanding of Congress, the Dawes Commission, and the Creek people, as well as to the subsequent practice in the state and federal courts, all of which confirm the disestablishment of the Creek Nation's historic domain.

B. The State Of Oklahoma In Any Event Has Jurisdiction Over Respondent's Crime

Even if the Creek Nation's original territory could somehow be considered a present-day reservation in some sense, Oklahoma still would have criminal jurisdiction over respondent's crime. The statutory history of Oklahoma jurisdiction over crimes involving Indians in the former Indian Territory is unique. Nothing in Congress's subsequent enactment in 1948 of the general definition of "Indian country" as including Indian reservations, 18 U.S.C. 1151(a), reveals an intent to implicitly repeal the relevant Acts of Congress and divest state jurisdiction.

1. Four of the Acts discussed above are especially significant. First, in 1897, Congress granted the United States courts in the Indian Territory "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" involving offenses by "any person" "irrespective of race." Indian Department Appropriations Act, ch. 3, 30 Stat. 83. The goal was "to place Indians upon precisely the same plane as the [non-Indians], giving them the same rights" under the law. 29 Cong. Rec. 2324 (1897) (Sen. Berry); see *id.* at 2305 (Sen. Vest).

Second, the Curtis Act abolished all tribal courts in the Indian Territory and barred enforcement of tribal law in the U.S. courts. §§ 26, 28, 30 Stat. 504-505.

Third, the 1904 Act confirmed that the application of Arkansas law "embrace[d] all persons and estates in [the Indian] Territory, whether Indian, freedman, or otherwise." § 2, 33 Stat. 573.

Fourth, the Enabling Act extended the territorial laws in force in the Oklahoma Territory over the entire State. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see also *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935); *Jefferson* v. *Fink*, 247 U.S. 288, 292-293 (1918). And it sent pending criminal cases that did not arise under federal law—that is, cases of a local nature—to the new Oklahoma state courts. Enabling Act §§ 16, 20, 34 Stat. 276, 277. The Enabling Act thus brought the members of the Five Tribes under the jurisdiction and substantive laws of the State.

2. After statehood, the federal and state courts consistently interpreted these Acts to confer broad criminal jurisdiction on the State. Judge Campbell of the new United States District Court for the Eastern District of Oklahoma ordered that "all prisoners" then

awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); *Many May Escape Law*, Muskogee Times-Democrat, Dec. 4, 1907, at 1. The Supreme Court of Oklahoma held that state courts had assumed jurisdiction of all crimes "not of a federal character" in the former Indian Territory—which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Ex parte Buchanen*, 94 P. at 944. And Oklahoma state courts regularly exercised criminal jurisdiction over crimes involving Indians in the former Indian Territory. *E.g.*, *McGlassen* v. *State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913); *Rollen* v. *State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912); see Pet. 27-28 & nn.5-6.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), also supports the understanding that the State obtained general criminal jurisdiction over Indians in the former Indian Territory. There, an Indian defendant indicted for murder prior to statehood had successfully moved to transfer his case from the Court for the Indian Territory to a federal court in Texas, under a special statute to protect against bias. Following statehood, he contended that the Enabling Act prohibited the Texas federal court from trying him and required the transfer of his case to state court in Oklahoma. The Court rejected that argument, concluding that the statute permitting transfer continued to permit

the defendant's prosecution in the Texas court. *Id.* at 90-91. But the Court did not question the premise of the defendant's argument that criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court.

3. If state courts did not have jurisdiction over crimes committed by Indians against other Indians following statehood, then *no court* would have had jurisdiction. Federal jurisdiction over such crimes was limited to listed major crimes, Indian Major Crimes Act § 9, 23 Stat. 385, and the tribal courts had been abolished since 1898. Thus, if the decision below were correct, then from statehood through the reestablishment of the tribal courts years later, see *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1443-1447 (D.C. Cir. 1988) (holding that the Oklahoma Indian Welfare Act authorized reestablishment of the Creek Nation's courts), cert. denied, 488 U.S. 1010 (1989), *no* court would have had jurisdiction over many crimes committed by Indians in the former Indian Territory.

4. The statutory definition of "Indian country" to include "land within the limits of any reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code in 1948. Act of June 25, 1948, ch. 645, 62 Stat. 757. That general provision does not specifically address or aptly describe the unique situation of the Five Tribes in the former Indian Territory, and there is no indication that Congress intended to repeal the existing jurisdictional framework there. See, *e.g.*,

National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted).[5]

5. Thus, for 80 years—from Oklahoma statehood until the late 1980s—the United States and Oklahoma understood that the State had jurisdiction over crimes involving Indians in the former Indian Territory. The state courts exercised that jurisdiction regularly, and the issue appeared settled in 1936, when the Oklahoma Court of Criminal Appeals held (albeit on a different theory) that the State had jurisdiction over the murder of one Choctaw Indian by another on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156.

In the late 1980s, however, the Oklahoma courts held that the State "does not have jurisdiction over crimes committed by or against an Indian" on restricted allotments within the former Indian Territory, *State* v. *Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989), relying on the definition of "Indian country" enacted in 1948 to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c). Accord *Cravatt* v. *State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State* v. *Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1031 (1989). The Tenth Circuit reached the same conclusion in 1992. *United States* v. *Sands*, 968 F.2d 1058, 1061-1063, cert. denied, 506 U.S. 1056 (1993).

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[5] The Secretary of the Interior reached the same conclusion, stating in a 1963 opinion that codification of the "Indian country" definition "does not appear to require revision" of the Secretary's earlier determination that Oklahoma maintained jurisdiction "over offenses committed by and against Indians on restricted allotments" in the former Indian Territory. App., *infra*, 8a.

In its amicus brief in support of the certiorari petition in *Brooks* (No. 88-1147), and its response to the petition in *Sands* (No. 92-6105), the United States argued that the State possessed jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. This Court, however, denied the petitions, and the United States has exercised jurisdiction over crimes committed by or against Indians on trust lands and restricted allotments in the former Indian Territory since 1992. The United States did not urge this Court to grant review on the question of jurisdiction over allotments when respondent sought certiorari from the denial of his state habeas petition. U.S. Br. at 15 & n.8, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787). That question turns on the enactment of 18 U.S.C. 1151(c) in 1948 and is not directly presented here. Pet. App. 17a & n.10. There accordingly is no occasion for the Court to address the United States' jurisdiction over allotments in this case.

C. The Question Presented Is Extremely Important

The decision below has wide-ranging and serious implications for law enforcement. For more than a century, the United States and Oklahoma have operated on the understanding that the State has jurisdiction to try offenses committed by Indians within the original boundaries of the Creek Nation. The United States has not exercised law enforcement authority over such offenses —except since the late 1980s on trust lands and remaining restricted allotments, which comprise less than five percent of the land within the Creek Nation's former territory. Nor has the Creek Nation exercised other forms of governmental authority over unrestricted lands within its former territory.

If the decision below were permitted to stand, it would vastly increase the scope of federal jurisdiction over crimes involving Indians in eastern Oklahoma. The federal government would have exclusive jurisdiction over most crimes by or against Indians in most of eight counties, including the City of Tulsa, with a total population of about 950,000 people.[6] That expansion could result in a massive increase in the federal government's Indian-related law-enforcement responsibilities: In 2017, federal prosecutors in the Eastern District of Oklahoma brought just three felony indictments based on Indian country jurisdiction; that number could increase to more than 500 indictments annually under the Tenth Circuit's decision.[7] Misdemeanor prosecutions

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[6] These counties include Tulsa, Creek, Wagoner, Okmulgee, Okfuskee, Muskogee, McIntosh, and Hughes. The original boundaries of the Creek Nation also extend slightly into the Northern District of Oklahoma in northern Tulsa County (outside the City of Tulsa) and small portions of Rogers and Mayes Counties. For population estimates, see U.S. Census Bureau, U.S. Dep't of Commerce, *Quick Facts*, https://www.census.gov/quickfacts/fact/table/US/PST045217.

[7] In 2016, the Oklahoma district attorney's office in Tulsa County filed 7851 felony indictments, The Supreme Court of Oklahoma, *Annual Report Fiscal Year 2016*, at 14, http://www.oscn.net/static/annual-report-2016.pdf; Tulsa County's population was approximately 640,000 people, U.S. Census Bureau, U.S. Dep't of Commerce, *Quick Facts*: *Tulsa County, Oklahoma*, https://www.census.gov/quickfacts/fact/table/tulsacountoklahoma/PST045216. Applying the resulting felony-indictment rate of 1.23% to the roughly 43,000 Creek Nation members who live within the Nation's original territory, see The Muscogee (Creek) Nation, *Facts and Stats* (Apr. 18, 2016), http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/, yields an estimate of 529 felony indictments against Nation members each year. This estimate does not include indictments against members of other tribes residing in the area, or indictments

would add even more to the caseload. The federal government lacks sufficient investigatory and prosecutorial resources in the area to handle that volume of cases; the FBI currently has the equivalent of seven agents for all of eastern Oklahoma. What is more, the decision below "raises the specter that hundreds or thousands of state convictions involving tribal members in the eastern half of Oklahoma will be subject to collateral attack." Pet. 21.[8]

The Tenth Circuit's reasoning could well extend to the original territories of each of the Five Tribes, expanding federal jurisdiction over nearly *all* of eastern Oklahoma. See Pet. 17-18. And it could have significant implications for application of state tax and other civil laws to Indians in the former Indian Territory. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114 (1993). The decision below thus threatens to disrupt the distribution of governmental authority in nearly half of Oklahoma.

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for offenses by non-Indians against Indians, which would be subject to exclusive federal jurisdiction under the decision below.

[8] The Tenth Circuit previously held that a decision shifting Indian country jurisdiction from federal to state courts would not apply retroactively on collateral review. *United States* v. *Cuch*, 79 F.3d 987, 995, cert. denied, 519 U.S. 963 (1996). But the State in this case did not argue non-retroactivity as to respondent, and the court granted relief on collateral review, reasoning, in dicta, that the *Solem* framework it applied was not new. Pet. App. 57a-58a n.36.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
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MARCH 2018

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81), the whole area was known as the Indian Territory. During this period the Government recognized the ex-

clusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U.S.C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson*, 40 Fed. 372. C.C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown v. United States*, 146 Fed. 975 (C.C.A. 8th, 1906)). As Territorial courts

they could enforce section 548 of title 18 by the trial of the Indians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently acquired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States v. Ramsey*, 271 U.S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi*, 61 P.(2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by Indians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions

as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.
CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or

permitting tribes to petition for such jurisdiction, or providing local option for the assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore, the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians appropriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self- government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agree-

able with you and whichever officials for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755

No. 17-1107

IN THE

Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA CATTLEMEN'S ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, MAYES COUNTY FARM BUREAU, MUSKOGEE COUNTY FARM BUREAU, OKLAHOMA OIL & GAS ASSOCIATION, AND STATE CHAMBER OF OKLAHOMA IN SUPPORT OF TERRY ROYAL, WARDEN, OKLAHOMA STATE PENITENTIARY'S PETITION FOR WRIT OF CERTIORARI

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The Environmental Federation of Oklahoma, Inc. (EFO), Oklahoma Cattlemen's Association (OCA), Oklahoma Farm Bureau Legal Foundation (OFBLF), Mayes County Farm Bureau, Muskogee County Farm Bureau (collectively Farm Bureau), Oklahoma Oil & Gas Association (OKOGA), and State Chamber of Oklahoma (SCO) (collectively *Amici*) submit this *amici curiae* brief in support of the Petition for Writ of Certiorari (Petition) filed by Terry Royal, Warden, Oklahoma State Penitentiary, pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

The Petition requests the Court to review and reverse the decision of the Tenth Circuit Court of Appeals declaring the former Creek Nation lands, established by treaty in 1866 (former Creek territory), a reservation of the present Muscogee (Creek) Nation (MCN), never disestablished by Congress. The decision upends a century of criminal, civil, and regulatory jurisdictional understandings in Oklahoma, ignoring long-settled expectations and engendering economically destructive confusion regarding sovereign rights within Oklahoma.

The effects of the decision are potentially profound and affect much of the State of Oklahoma. The geographic scope of the former Creek territory covers large areas of Eastern Oklahoma, including large portions

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of the City of Tulsa. The decision threatens to authorize tribal taxation of activities and properties, to invest tribal courts with broader jurisdiction, and to authorize greater, or potentially exclusive, tribal and federal regulation over lands within the area. Further, because the applicable statutory actions and histories of the Cherokee, Chickasaw, Choctaw, and Seminole Tribes, the other four of the Five Civilized Tribes, are similar in certain respects to those of the MCN, the decision will be, and already has been, asserted to redraw jurisdictional boundaries across Eastern Oklahoma.

INTERESTS OF *AMICI CURIAE*

Amici and their members are affected by the decision below because their members live, own businesses, and have invested in Eastern Oklahoma. The decision places at risk long-held understandings regarding the governmental entities with adjudicative, regulatory, and legislative jurisdiction over *Amici*'s members, their businesses, and investments. *Amici* are all non-profit associations or foundations whose members reside or own and operate businesses in the former Creek territory and within areas the decision may imply lie within reservations of others of the Five Civilized Tribes.

A. Environmental Federation of Oklahoma, Inc.

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies. Its membership includes more than eighty company, affiliate, associate, and appendix affiliate members. EFO works to ensure that environmental regulations are clear and consistent and that they properly bal-

ance the need for environmental regulation with the need for responsible economic growth. EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation, will be adversely impacted by the decision if the MCN or federal agencies now seeks to supplant state environmental regulation and to impose federal or tribal regulations over the activities of non-tribal members on fee-owned lands within the Creek or, potentially, the Five Civilized Tribes' former territories.

B. Oklahoma Cattlemen's Association

OCA, a non-profit association, was chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Today, the OCA includes cattle raising families in all 77 counties in Oklahoma. Within the former Creek territory, OCA is affiliated with local county Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families, OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's and Nation's beef cattle industry. The decision threatens to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

C. Oklahoma Farm Bureau Legal Foundation, Muskogee and Mayes County Farm Bureaus

OFBLF is a non-profit foundation, incorporated in 2001, that supports the rights and freedoms of farmers and ranchers in Oklahoma, by promoting individual liberties, private property rights, and free enterprise.

OFBLF's sole member is the Oklahoma Farm Bureau, Inc. (OKFB), an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB has 87,950 members, representing agricultural producers who grow a variety of crops and livestock, and every size of operation, from small family farms to large commercial ranches and farms. Its mission is to improve the lives of rural Oklahomans by analyzing their problems and formulating action to achieve educational improvement, economic opportunity, social advancement, and thereby to promote the well-being of the nation. It is non-partisan and non-sectarian.

A significant number of OKFB members are in counties that, under the decision, are fully or partially within the former Creek territory. As of February 19, 2018, 13,237 OKFB member families are in Creek, Hughes, McIntosh, Mayes, Muskogee, Okfuskee, Okmulgee, Rogers, Seminole, Tulsa, and Wagoner Counties. Within the former Five Civilized Tribes area, there are 37,649 OKFB member families. While some of OKFB's members may also be MCN members or members of others of the Five Civilized Tribes, OKFB members who are not tribal members may lack political or legal remedies or resources to address potential grievances caused by new MCN, Five Civilized Tribe, or federal assertions of jurisdiction grounded in previously unheralded reservation status.

Muskogee and Mayes County Farm Bureaus are county affiliates of the OKFB. Muskogee County's 1,702 members have farming and cattle operations. Mayes County's 950 members primarily farm soybeans, hay, and feed grains, and raise cattle and poultry. The interests of members of both County organizations are affected by the decision because it imposes significant

uncertainties as to the law, taxation, regulatory and adjudicatory jurisdiction to which their homes and farms are subject.

D. Oklahoma Oil & Gas Association

OKOGA was formed in 1919 as the Mid-Continent Oil and Gas Association, and is one of the oldest oil and gas industry associations in the United States. OKOGA is a non-profit association composed of oil and natural gas producers, operators, purchasers, pipelines, transporters, processors, refiners, marketers, and service companies which represent a substantial sector of the oil and natural gas industry within Oklahoma. OKOGA's membership also includes the state's largest pipeline, gathering, and processing companies, and all four refiners in the state.

OKOGA addresses industry issues of concern and works toward the advancement and improvement of the domestic oil and gas industry. The activities of OKOGA include support for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the State and throughout the United States. Members of OKOGA own or operate oil and gas operations in the counties within the former Creek territory, as well as within former territories of others of the Five Civilized Tribes. The decision impairs their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

E. State Chamber of Oklahoma

SCO represents more than 1,500 Oklahoma businesses and 350,000 employees. It has been the state's leading advocate for business since 1926. SCO provides a voice for Oklahoma employees to the executive,

legislative, and judicial branches of government, and is in a unique position to advise the Court of the impact of the civil implications of the regulatory, taxation, and economic development consequences of the decision on its members' interests, and its potential effect on business development within the former Creek territory.

SUMMARY OF ARGUMENT

The Petition should be granted because the decision: 1) involves a question of exceptional importance—whether the former Creek territory remains a reservation of the MCN despite Congress' repeated actions divesting the Creek Nation of essentially all lands and governmental authority as of 1907—the answer to which has staggering jurisdictional consequences for people and businesses in Oklahoma; and 2) offers a vehicle for the Court to clarify application of its analysis in *Solem v. Bartlett*, 465 U.S. 463 (1984), to historical circumstances fundamentally different from the Court's prior disestablishment and diminishment cases, particularly within Oklahoma's unique historical setting.

ARGUMENT

I. THE SIGNIFICANT CIVIL JURISDICTIONAL CONSEQUENCES OF THE DECISION SUPPORT THIS COURT'S REVIEW.

The decision overturns the assumptions underlying civil jurisdiction over persons and businesses within the former Creek territory. More troubling, it does so without addressing Oklahomans' reliance on longstanding understandings and expectations regarding, or the effect of its new ruling upon, civil jurisdiction. If allowed to stand, the ruling provides a basis for the MCN, and potentially other tribes, to assert tax and

regulatory jurisdiction, and for tribes and their members to assert tribal adjudicatory jurisdiction over private property and business. This potentially duplicative and inconsistent regulation and jurisdiction undermine legal foundations underlying private property and investment, creating significant risk and uncertainty for people and businesses.

A. The decision threatens to substantially enlarge tribal civil jurisdiction over nonmembers in Eastern Oklahoma.

Although the criminal jurisdictional consequences of the decision are overwhelming, the question presented also raises confounding civil consequences. In an area where most residents and businesses owners are not members of the MCN (or the other Five Civilized Tribes), and where most land is owned in fee by nonmembers or their businesses, the decision's civil regulatory effects are staggering. Tribes lack civil jurisdiction over nonmembers on fee lands outside reservation boundaries. Hence, the determination that a geographic area is an Indian "reservation" has significant civil jurisdictional effect. *Cf. United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes retain "attributes of sovereignty over both their members and their territory").

Federal law defines "Indian county" as including "all lands within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Just as with criminal jurisdiction, federal law defining tribal jurisdiction considers "Indian country" status pertinent—or dispositive—both under federal common law defining whether tribal (and federal) or state powers apply, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S.

520, 527 (1998) (stating "Indian country" "also generally applies to questions of civil jurisdiction"), and by express delegation employing the term, *see Rice v. Rehner*, 463 U.S. 713, 733 (1983) (in 18 U.S.C. § 1161, "Congress intended to delegate a portion of its authority to the tribes"). Reservation status, even without specific statutory reference to "Indian country," also can support tribal jurisdictional assertions. *See Montana v. United States*, 450 U.S. 544, 566-67 (1981) (prescribing two exceptions to its general rule that tribes lack jurisdiction over nonmember activities on fee lands, as "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations, even on non-Indian fee lands*," including those "who enter consensual relationships with the tribe or its members" and those whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe") (emphasis added). Reservation-based civil jurisdiction can extend to taxation, regulation, and court jurisdiction, or can be imposed by express federal delegation over "reservation," or "Indian country" lands.

B. The decision may support tribal taxation.

The decision threatens *Amici* with tribal taxation of nonmembers' fee land and activities in certain circumstances.[2] *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (Navajo Nation tax on hotel receipts on reservation fee lands could apply if either *Montana* exception established); *Burlington*

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[2] The MCN Tax Code asserts, among other taxes, a Sales Tax, MCN Tax Code § 4-101-4-110, and an Oil and Gas Severance Tax, MCN Tax Code § 8-101-8-118.

N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 775 (9th Cir. 2003) (tribe entitled to discovery on whether it could impose *ad valorem* property tax on right-of-way, the equivalent of fee lands, on reservation). Not only does the decision threaten tribal taxation, but it might subject *Amici* to dual state and tribal taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving dual state severance tax in addition to tribal severance taxes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982) (tribe may tax on-reservation production even though tribe receives royalty from oil and gas leases). For example OKFB's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery to operate a farm or ranch, and other items are exempt from State sales tax. In their historically low-margin industry, any additional taxes would be burdensome.

C. The decision threatens Oklahoma citizens and business with dispute resolution in tribal courts.

The decision potentially subjects fee lands and nonmember activities to tribal adjudicatory jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997). Determining whether tribes have jurisdiction over nonmember activities upon reservation fee lands requires application of the two fact-based and highly subjective exceptions prescribed by *Montana*, which frequently must first be addressed in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). To whatever degree dispute resolution shifts to tribal forums, nonmembers enjoy no right to federal court review of deprivations of due process or other civil rights under the Indian Civil Rights Act of 1968, 25

U.S.C. § 1302. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). If the decision is not reversed, *Amici*'s members may be required either to exhaust their remedies in tribal courts or to litigate there without right of federal or state court review.

The MCN is preparing to exercise its jurisdiction over millions more individuals and businesses. *See* Jason Salsman, *Increased LTPD [Lighthorse Tribal Police Department] jurisdictional duties at the heart of Murphy decision*, Mvsoke Media, Dec. 15, 2017, https://mvskokemedia.com/increased-ltpd-jurisdictional-duties-at-the-heart-of-murphy-decision/. Whether the MCN's courts can handle hundreds more cases from across the former Creek territory remains unknown. Further uncertainty would arise if the decision were extended to the Five Civilized Tribes.

D. The decision threatens Oklahoma citizens and business with tribal regulatory jurisdiction.

The decision threatens to subject nonmember residents and businesses in the former Creek territory to other forms of MCN, and potentially other Five Civilized Tribes, regulatory jurisdiction. *See Montana*, 450 U.S. at 566. While any such assertion would be fact-dependent, tribal regulatory jurisdiction can extend under *Montana* to nonmembers "who enter consensual relationships with the tribe or its members" and those whose conduct "threatens or has some direct effect on the political integrity, the economic security, orthe health or welfare of the tribe." *Id.* In addition,the determination that the MCN has a continuing reservation may trigger claims they retain reserved water rights for a large reservation, *see*

Winters v. United States, 207 U.S. 564 (1908), presenting resource uncertainty.

E. The decision ousts state regulation, subjecting nonmembers to federal or tribal regulation.

While the decision threatens tribal regulatory jurisdiction over fee lands under the fact-dependent *Montana* test, 450 U.S. at 566, by express Congressional directive, reservation status likely triggers reservation-wide ouster of state regulation, supplanting it with exclusive federal authority over nonmember businesses—and may authorize federal administrative delegations of exclusive authority over all "reservation" lands to tribes. Federal law provides tribal regulations may govern the sale of alcohol by restaurants and stores within "Indian country." *See Mazurie*, 419 U.S. at 558 (interpreting 18 U.S.C. § 1161). Consequently, the decision would have precisely the effect of the Omaha Tribe ordinance in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), not just for a small village but across major portions of Eastern Oklahoma and most of the State's second largest city. It would prohibit the sale of alcoholic beverages without a license issued by the MCN National Council under its federally approved Liquor and Beverage Code. *See* 73 Fed. Reg. 14997 (March 28, 2008).

For businesses that now find themselves within the "reservation" identified by the decision, and potentially the former territories of the other Five Civilized Tribes, obtaining federal permits, licenses, or other authorizations may require participating in, or awaiting, government-to-government consultation between tribes and the federal government. Under the National Historic Preservation Act, consultation is required for historic properties on "tribal land," defined, in

relevant part, as "all land within the exterior boundaries of any Indian reservation." 54 U.S.C. § 300319. While *Amici* do not dispute government-to-government consultation is proper where required, the decision threatens to expand that requirement to most of Eastern Oklahoma. With the consultation requirement comes additional expense, delay, and possible imposition of conditions upon any federal approval required for a development project. These provisions and related federal policies reflect the range of possible unintended, and unexamined, consequences of the decision below.

F. The jurisdictional consequences of the decision will affect *Amici*.

The civil consequences of the decision will have a profound effect on *Amici*. Those consequences overturn the legal environment in which OKOGA's members have invested substantial sums to develop oil and gas operations in the former Creek territory, with implications for the broader Five Civilized Tribes areas. Moreover, the potential for shifting regulation of oil and gas operations, structured in reliance on state regulation, to federal agencies and, potentially to tribes, would impose new regulators, regulatory structures, and increased costs. The consequences for EFO, OFBLF, the county Farm Bureaus, OCA, and SCO members are equally substantial.

13,237 OKFB member families live or have business interests located with the former Creek territory. In those same eleven Oklahoma counties, the United States Census Bureau reports 69,928 non-minority owned businesses and 19,499 minority owned busi-

nesses.[3] *See* U.S. Census Bureau, Quick Facts, www.census.gov/quickfacts (last visited March 6, 2018) (search by county). The number of non-Native-owned businesses that may be subject to MCN civil jurisdiction or reservation-based claims of federal jurisdiction is unquestionably substantial. Within the broader Five Civilized Tribes area, the consequences are substantially greater: just within OKFB families, not considering members represented by other *Amici*, there are 37,649 OKFB member families. While tribes may not prevail in some jurisdictional assertions, the Tenth Circuit's failure to address the profoundly unsettling effect of its decision calls out for this Court's review.

The decision opens the proverbial can of worms regarding civil jurisdiction over *Amici* and other, similarly situated, nonmembers and businesses in Eastern Oklahoma. The Court should grant the Petition to address those concerns.

II. THE ISSUE OF CORRECT APPLICATION OF *SOLEM* IS VITALLY IMPORTANT AND NEAR CERTAIN TO RECUR.

The decision struggled to apply a rigid and formulaic test it found in *Solem* to conclude that the former Creek territory remained a reservation despite understandings it was disestablished as of statehood. Tenth Circuit Chief Judge Tymkovich observed, "the square peg" of *Solem* "is ill suited for the round hole of Oklahoma statehood." Pet. App. 232a. But that is only true if the "opened for settlement" fact pattern of *Solem* is the only method by which Congress can act to

[3] The category of minority owned businesses is not limited to businesses owned by MCN members and other Native Americans.

terminate a reservation. That is not the case. To the contrary, the principles *Solem* enunciates contain ample flexibility to encompass Oklahoma's unique history. But the court of appeals misapplied *Solem* because it failed to perceive the different, though more compelling, indications of Congressional intention to disestablish the Creek Nation than were present in *Solem* and its cited diminishment and disestablishment cases.

A. The court of appeals misapplied *Solem*.

Solem summarized a three-part test to determine whether Congress has "diminished" an Indian reservation when it enacted "surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and *to open up unallotted lands* for non-Indian settlement." 465 U.S. at 467 (emphasis added). In each case *Solem* analyzed, Congress had created a reservation for the tribe, the lands in all or a portion of the reservation were allotted and the remainder sold, but the tribe's government would remain in place, retaining all tribal powers over remaining tribal lands and allotments. *See DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 442 (1975). But Congress went far further in terminating the former Creek government and its territory. As to the Creek Nation, no traditional reservation ever had been created, and Congress unqualifiedly divested the Creek Nation of title to essentially *all* Creek Nation lands, transferred them to individual Creek members as allotments, and stripped the Creek Nation of all vestiges of governmental authority to tax, regulate, or resolve disputes throughout its former territories.

Solem's three-step analysis of Congress' intent starts with the "statutory language used to open the Indian lands." 465 U.S. at 470. The hallmark is

Congressional intent: "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Id.* But the Tenth Circuit overlooked that specific language *is not* required: "[E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 471. The court below, lost in the trees of the "opened for settlement" case fact patterns, missed the forest of Congressional intent embodied in a string of statutes stripping the Creek Nation of its lands and governmental powers. In addition, *Solem* makes clear courts may look at "events surrounding the passage" of Congressional enactments (step two) *and* "events that occurred after" Congress disposed of the lands previously comprising a reservation (step three). *Id.* Steps two and three look to "'unequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State . . . ." *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)).

1. Statutory language reflects Congress' intent to divest the Creek Nation of all governmental authority over its former lands.

Beginning in 1893, Congress passed a series of acts with the intent of dismantling the Creek government and territory and ending tribal jurisdiction. While the decision reviewed several statutes seriatim, *see* Pet App. 75a-107a, it sidestepped searching inquiry into Congressional intent reflected in the series of enactments, insisting intent be expressed as in a specific statute precisely in terms accepted in this Court's

prior cases. But those cases considered tribes with very different histories, none fitting a pattern instructive at Creek or across the Five Civilized Tribes.

The decision disregards that the 1893-1906 Congresses addressing the Creek Nation unfailingly prescribed, in a series of eight acts, the fundamental criteria of non-reservation status: divestiture of *both* communal tribal title to all lands *and* all governmental authority over the area. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612, 646 (the goal of "ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union"); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("the United States courts. . . shall have original and exclusive jurisdiction. . . [over] all civil. . . and all criminal causes"); Curtis Act, ch. 517, 30 Stat. 495, 504-505 (June 28, 1898) (prohibiting enforcement of tribal law in United States courts and abolishing tribal courts); Act of March 1, 1901, ch. 676, 31 Stat. 861, § 42 (1901 Act) (the Creek national council acts or ordinances could pertain only to tribal or allotted lands or tribal members—if approved by the President); *id.* § 47 (disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress"); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 (1902 Act) (replacing Creek law of descent and distribution with Arkansas law); Five Tribes Act, ch. 1876, 34 Stat. 137, §§ 10, 16 (April 26, 1906) (requiring Secretary to assume control of tribal revenues, schools); *id.* § 28 (limiting terms of councils and requiring President's approval of ordinances). Finally, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.

The decision sought doggedly to apply the *Solem* framework, but erred in its application by concluding Congressional intent to disestablish can *only* be found when previously accepted language is contained in a single statute. *See* Pet. App. 107a (stating each of the analyzed statutes "lack any of the 'hallmarks of diminishment'" (quoting *Parker*, 136 S.Ct. at 1079)). Although it denied doing so, the decision sought to find "magic words" in any single Congressional act, holding Congress had failed to meet the panel's created test for reservation disestablishment. *See* Pet. App. 101a. *Solem* imposed no textual straight-jacket, and this Court has never mandated such a narrow and rigid test for determining Congressional intent. Statutory text "consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941)). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455 (quotation marks and citations omitted).

The decision tried to pigeonhole the unique historical setting of the Creek Nation, the Five Civilized Tribes, and Eastern Oklahoma into patterns that arose in prior, fundamentally different cases in other portions of Indian country, while discarding *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011), a highly relevant precedent. *See* Pet. App. 61a. *Irby*, on a substantially similar historic record, found disestablishment when the relevant statutes "did not directly open the reser-

vation to non-Indian settlement." 597 F.3d at 1123. The same applies here. "Under settled principles of statutory construction," statutes that are "*in pari materia*—that is, pertain to the same subject— . . . should therefore be construed 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 3 How. 556, 564 (1845)). By failing to read and construe together the long line of Congressional acts expressing the intent to terminate the Creek communal landholdings and government and end tribal authority over people and lands in the new State, the decision ignored this Court's longstanding teachings.

The decision fails to address whether statutory divestiture of all recognized tribal communal lands and governmental powers, by a series of statutes providing exclusively for Territorial and State law and non-tribal courts, both 1) unambiguously contemplated the termination of any prior reservation status of the former lands, and 2) provides powerful contemporaneous evidence Congress intended to terminate. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-606 (1977). The decision's unexamined insistence on facts far different from Eastern Oklahoma history led it to ignore compelling expressions of Congressional intent. Congress allotted substantially all Creek lands to members, contemplating the widespread transfers to nonmembers that ensued, with the intent that all would reside—and do business—in Oklahoma, a non-reservation environment.

Instead, the decision emphasizes immaterial factors: whether the Creek Nation's tribal existence was terminated,[4] Pet. App. 96a-98a; whether the Creek

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[4] The decision incorrectly relies on scattered references to the "Creek Nation," which, in context, is plainly a mere "convenient

Nation retained limited jurisdiction over tribal or trust or restricted allotted lands, *id.* 105a-107a; and whether the United States continued to discharge trust responsibilities over tribal or trust or restricted allotted lands, *id.* 102a-103a. However, those facts existed in every case in which this Court found disestablishment or diminishment. *See, e.g.*, *Rosebud Sioux*, 430 U.S. at 604; *DeCoteau*, 420 U.S. at 442-43.

The decision below stands in stark contrast to *Irby*, which applied *Solem* to hold Congress disestablished the Osage Nation reservation, also effective upon 1907 Statehood, while observing that Congress "disestablished the Creek and other Oklahoma reservations." *Irby*, 597 F.3d at 1124. *Irby*'s analysis gave due weight to factors unique to Oklahoma history. In ignoring the plain Congressional intent and history specific to the MCN. the Tenth Circuit fundamentally misapplied *Solem*.

2. Contemporaneous understanding reflects Congress disestablished any former Creek Nation reservation.

Solem step two requires a court look to "contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," *Solem*, 465 U.S. at 471, including "the manner in which the transaction was negotiated" with the tribes involved and the tenor of legislative reports presented to Congress, *id.* In *Irby*, the Tenth Circuit's analysis relied on a similar series of Congressional acts and legislative history, including the Oklahoma Enabling Act, to establish that the Osage Allotment Act was "passed at a time where the United States sought

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geographical description" to define the geographic area within which prescribed transfers or federal services for the Creek would apply. *Yankton Sioux*, 522 U.S. at 356.

dissolution of Indian reservations, *specifically the Oklahoma tribes' reservations.*" *Irby*, 597 F.3d at 1124 (emphasis added).

First, the decision's conclusion that pre-1901 legislative history did "little to advance the analysis because the State does not dispute that the reservation was intact in 1900," Pet. App. 109a (quotation marks, citation omitted), ignores the continuity of intent in multiple statutes. The intent to disestablish the Creek Nation reservation expressed in the pre-1901 acts remained and was executed by the 1901 and 1902 Acts and confirmed in 1906 by the Five Tribes Act and the Oklahoma Enabling Act. Congress' pre-1901 enactments, and their legislative histories, declared the policy of the United States toward the Five Civilized Tribes, which, for the Creek, led to the enactment of the 1901 and 1902 Acts. Consequently, the pre- and post-1901 enactments demonstrate a continuity of purpose the decision minimized or ignored.

Second, and contrary to the decision's limited review, the legislative histories from the eight statutes reflect Congress' goal was to transfer jurisdiction from the Creek Nation to the State, abolish communal landholdings in favor of individual ownership, and subject all such lands and residents to State law and courts, a goal entirely inconsistent with continued reservation status. *See, e.g.*, *United States v. Hayes*, 20 F.2d 873, 879-880 (8th Cir. 1927) (reviewing, as relevant to the Creek government, the "course of legislation, from its beginning to end," and concluding its "main purpose was to do away with the tribal governments"); H.R. Rep. No. 57-2495, 1 (June 14, 1902) (Committee on Indian Affairs report summarizing that the 1902 Act "will permit the Government to close up the affairs of the Creek tribe of Indians, make

all of their allotments, and finish the work of the Dawes Commission in said nation . . . ."). The decision did not consider thoroughly the legislative histories that demonstrate Congress intended to disestablish the Creek Nation "reservation" and substitute State criminal, civil, taxing, and adjudicatory jurisdiction and individual land ownership. The contemporary understandings of the 1901 and 1902 Acts, and the enactments culminating in Statehood in 1907, was that the Creek Nation lost jurisdiction over any of its former territory (except that expressly retained for the tribe by Congress).

3. Subsequent treatment of the former Creek territory reflects the understanding it was disestablished.

The decision took too cursory a look at the *Solem* step three evidence and inadequately considered subsequent treatment of the former Creek territory by Congress and the State of Oklahoma. The State's unquestioned exertion of jurisdiction over the predominantly non-Indian, nonmember population residing on former Creek Nation lands since Statehood in 1907 strongly supports a conclusion of reservation disestablishment. *See Rosebud Sioux*, 430 U.S. at 604-6; *see also Creek Nation v. United States*, 24 Ind. Cl. Comm. 238, 250 (1970) (upon the passage of acts to dissolve the Creek Nation, "[t]he United States assumed the task of terminating the Nation's mode of life include its manner of holding its lands"). The court of appeals did not consider evidence that the duty of maintaining order and enforcing laws has almost exclusively resided in the hands of county and State officials, not tribal government. *See Hagen v. Utah*, 510 U.S. 399, 421 (1994).

Over a century of unqualified reliance by predominately nonmember residents and businesses in

the former Creek territory reflects the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The equitable doctrines that led this Court to conclude in *City of Sherrill* that "long delay . . . and developments in the [area] spanning several generations, . . . render inequitable [a] piecemeal shift in governance," *id.* at 221, appropriately figure in a *Solem* step three analysis on the record presented here. The court of appeals failed to address that extended reliance.

For decades, companies doing business in the former Creek territory have been subject to State taxation, regulation, and dispute resolution in State courts. The decision dismissed the State's evidence on Congressional intent and subsequent history. The Court confirmed in *Nebraska v. Parker* evidence of congressional intent and of subsequent treatment figure significantly in the *Solem* analysis, but found modern treatment alone of the Omaha area was insufficient to show disestablishment in light of a statute "devoid of any language indicative of an intent to diminish." 136 S. Ct. at 1082. The Tenth Circuit failed to distinguish between *Parker* and evidence below of compelling statutory texts and the unequivocal indications of involved participants that the Creek Nation had no remaining reservation. The decision erred in failing to accord adequate weight to *Solem* steps two and three.

B. The Court should review whether *Solem* affords latitude to determine Congress' intent in factual settings different from *Solem*'s, a question that will recur.

As the Petition shows, the former Creek territory was never a reservation, because the Tribe held the land in fee. *See* Petition 30. The same is true of the other Five Civilized Tribes. Rote application of the three *Solem* factors as they were applied in "opened for settlement" cases was inappropriate to determine Congressional intent as to the Creek Nation "reservation," as it will be in cases likely to follow. The evidence is compelling. Congress intended to strip the Creek Nation of essentially all governmental authorities *and* land holdings. Finding a reservation now because Congress did not replicate the pattern of reservations "opened for settlement" is a serious error that this Court should correct.

The eight statutes far more thoroughly divested tribal lands and powers of the Creek Nation than did those in *Solem*, which described the "surplus lands acts" it considered as intended merely "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. The Court should issue its writ to review the decision below and address how *Solem*'s structured analysis may be applied to address Congressional acts that did not fit the pattern of surplus lands acts in areas "opened" to non-Indians.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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No. 17-1107

IN THE
Supreme Court of the United States

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" subject to federal and tribal jurisdiction and regulation.

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INTEREST OF AMICUS CURIAE

The Oklahoma Independent Petroleum Association ("OIPA") represents more than 2,200 independent oil and natural gas operators in the state of Oklahoma, as well as a number of oilfield service companies that provide important support to exploration and production activities.[1]

Many of OIPA's members operate within the historical boundaries of the Indian nations traditionally referred to as the Five Civilized Tribes—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. The Tenth Circuit's decision, which held that the land within the 1866 boundaries of the Creek Nation is still a reservation, threatens to render all the land within the historical boundaries of the Five Tribes—the entire eastern half of Oklahoma—"Indian country" under 18 U.S.C. § 1151.

The designation of this huge tract of land as Indian country does far more than replace state criminal jurisdiction with federal criminal jurisdiction. It could subject business owners to tribal taxes, exempt tribes and their members from state taxes, subject non-Indians to tribal land-use

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[1] The parties in this case received timely notice under Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

regulations, affect the alienability of oil and gas leases, and dramatically change the environmental regulation of oil and gas wells—all of which has far-reaching implications for OIPA's members.

SUMMARY OF ARGUMENT

As the petition ably explains, this case has significant implications for criminal jurisdiction within Oklahoma. Nearly half of the state—home to 48% of its population—may now be considered Indian country, depriving Oklahoma of its authority to prosecute crimes committed by or against tribal members on these newly constituted reservations. Pet. at 21–23.

But this case is about far more than criminal jurisdiction. By effectively declaring half the state to be Indian country, the Tenth Circuit's decision will upend practically every aspect of Oklahoma's legal and regulatory regime. The inevitable follow-on litigation the decision invites will create a cloud of uncertainty over an immense amount of economic activity in the state—including the vital oil and gas industry. The Tenth Circuit's decision, if allowed to stand, will replace Oklahoma's mature and stable regulatory regime with a new and uncertain regime of overlapping tribal, federal, and state regulation. It will take years, perhaps decades, of litigation to determine the effects of this new regulatory structure.

Accordingly, this is not merely a habeas case, or a case about the misapplication of this Court's reservation disestablishment doctrine. Rather, this is a case about the economic future of nearly half the

state of Oklahoma—and the many established businesses operating therein.

This Court's review is urgently needed.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Decision Will Upend Oklahoma's Energy Regulation

Oklahoma has been a leading producer of oil and gas for over a century, and is currently the 5th highest crude oil producing state in the country, and the 3rd highest natural gas producer. U.S. Energy Information Administration, *Oklahoma, U.S. Rankings*, *available at* https://tinyurl.com/yc7a5vly. Production occurs across the state, with active oil and gas wells in 71 of Oklahoma's 77 counties—including counties in each of the Five Tribe's historical territory. Indep. Petroleum Ass'n of Am., *The Oil & Gas Producing Industry in Your State*, 92 (November 2016), *available at* https://tinyurl.com/y7z24yrs.

Oklahoma's oil and gas industry has prospered under a stable, well-developed, and state-wide regulatory regime overseen by the Oklahoma Corporation Commission ("OCC"), which has been vested "with exclusive jurisdiction, power and authority" over oil and gas development in the state. 52 O.S. § 139(B)(1); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017); *see also Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 63 (1948) ("Since 1913," the OCC "has regulated the extraction of natural gas" in Oklahoma). "The OCC exercises its exclusive jurisdiction over [oil and gas] wells through a comprehensive system of permit

adjudication." *Sierra Club*, 248 F. Supp. 3d at 1200. The OCC also regulates the waste and pollution generated by energy development, and has sole jurisdiction to resolve complaints by private citizens alleging that an oil or gas project violates environmental law. *See id.* at 1209.

This regulatory regime was put in place based on the universal understanding that the historical territories of the Five Tribes are governed by Oklahoma, not tribal, law. *See, e.g.*, U.S. Energy Information Administration, *Oklahoma State Energy Profile*, *available at* https://tinyurl.com/ycfnxjzw ("Oklahoma's tribal areas are spread across about three-fourths of the state, but only one of the state's 38 federally recognized Native American tribes has a reservation."). From the State's founding, the tribes did not exercise control over energy development, but were essentially trust organizations that managed tribal funds. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1124 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "[T]he abolition of the tribe[s'] territorial sovereignty" has been the legal and regulatory norm for over a century. *Harjo*, 420 F. Supp. at 1143.[2]

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[2] The primary exception to Oklahoma's state-wide regulation of mineral rights relates to the land underlying the former reservation of the Osage Nation. *See, e.g.*, *Phillips Petroleum Co. v. U.S. E.P.A.*, 803 F.2d 545, 549 (10th Cir. 1986). At statehood, Congress "severed the mineral estate from the surface estate of the [Osage] reservation and placed it in trust for the tribe," thus allowing for Osage regulation of mineral and underground rights. *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010); *Phillips Petroleum*, 803 F.2d at 556 n.15. Although the mineral and energy rights were reserved for the tribe, the "Osage reservation has been disestablished." *Osage*

The Tenth Circuit's decision changing this established status quo will upend Oklahoma's unified, statewide oil and gas regulatory regime and throw all economic activity in eastern Oklahoma—including the oil and gas industry—into turmoil, resulting in overlapping and duplicative regulation and severe uncertainty.

A. The Tenth Circuit's Decision Eviscerates Oklahoma's Uniform Regulatory Regime

The decision below will abrogate over a century of uniform state regulation of Oklahoma's vibrant and growing economy, including its energy industry, and shift a significant portion of regulatory authority to the tribes. *See* Pet. 19–20.

1. The Tenth Circuit decided that all territory within the historical 1866 boundaries of the Creek Nation was an "Indian reservation" under 18 U.S.C. § 1151(a). Pet. App. 7a. Section 1151, enacted in 1948, codified the "different categories of Indian country mentioned in [this Court's] prior cases: Indian reservations; dependent Indian communities; and allotments." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998) (citing *Donnelly v. United States*, 228, U.S. 243, 269 (1913);

Nation, 597 F.3d at 1120. The OCC also lacks regulatory jurisdiction over various "allotments of individual citizens," which are also "Indian country within the express terms of § 1151(c)." *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992). However, these scattered pockets of Indian country constitute a very small percentage of Oklahoma's total territory.

United States v. McGowan, 302 U.S. 535, 538–539 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913)).

Although section 1151 is a criminal statute, its definition of "Indian country" "generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 n.2 (1975); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. 2010) ("Reservation land is by definition 'Indian country,' and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states.") (citing *Venetie*, 522 U.S. at 527 n.1). As a result, when a particular territory is designated "Indian country," the tribe generally has authority to regulate commercial conduct in that territory.

For example, in *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993), the State of Oklahoma sought to collect income taxes from tribal members residing within a small 800 acre parcel of land in Western Oklahoma allotted to members of the Sac and Fox Nation. *Id.* at 117–19. Oklahoma also sought to impose a vehicle "excise tax" and a "vehicle registration fee for all vehicles registered with the State of Oklahoma," including vehicles owned by tribal members living on tribal land. *Id.* at 118–19. The Tribe sued to enjoin the Oklahoma Tax Commission from collecting these general state-wide taxes on any tribe member living on Sac and Fox land. *Id.* at 120. The Court explained that any tribal member living in "Indian country," as defined in Section 1151, is "outside the State's taxing jurisdiction." *Id.* at 123 (citing 18 U.S.C. § 1151); *see*

also id. at 125 (the "presumption against state taxing authority applies to all Indian country, and not just formal reservations"). The Court thus held that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country," and remanded for further consideration of whether the Sac and Fox members lived in "Indian country." *Id.* at 128.

The "Indian country" designation also *empowers* the tribe to regulate much of the non-Indian activity on the territory. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, (2008) ("As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers."). Although a tribe's authority over non-members on a reservation is not unlimited, "'[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 329 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

Thus, in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the Court upheld the authority of the Navajo to "tax business activities conducted on its land," even when those activities were conducted by non-Indian mineral producers. *Id.* at 196; *see also id.* at 201 ("The power to tax members and non-Indians alike is surely an essential attribute of such [tribal] self-government."). Re-affirming that "the 'power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and

territorial management,'" *Kerr-McGee* found no inherent obstacle to tribal taxation of on-reservation conduct by non-Indians. 471 U.S. at 198 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)).

Whether a particular territory is designated "Indian country" also determines which entity has authority to impose environmental regulations. For example, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), "tribal, federal, and state official[s] disagree[d] as to the environmental regulations applicable to a proposed waste site." *Id.* at 340. The Court recognized that if the land on which the landfill was located "no longer constitute[d] 'Indian country' as defined by 18 U.S.C. § 1151(a)," the "State"—not the federal government—would have "primary jurisdiction" to regulate it. *Id.* at 333.

As cases such as *DeCoteau*, *Venetie*, *Sac & Fox Nation*, *Kerr-McGee*, and *Yankton Sioux* make abundantly clear, the designation of land as "Indian country" under Section 1151 has far-reaching consequences beyond criminal jurisdiction.

2. The new authority the Tenth Circuit's designation bestows on the tribes will result in a fundamental shift in regulatory authority from the state of Oklahoma to the tribes.

For example, Oklahoma has historically imposed a nondiscriminatory tax—*i.e.* a tax applying equally to Indians and non-Indians alike—on oil and gas operations taking place within the former boundaries of the Five Civilized Tribes. *In re Gross Prod. & Petroleum Excise Tax Protest of Bruner*, 130 P.3d 767, 770 (Ok. Ct. Civ. App. 2005). This was plainly permissible under Oklahoma's regulatory authority

over non-reservation land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973).

But states generally do *not* have authority to "tax[] Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero*, 411 U.S. at 148; *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–52 (1980). The Tenth Circuit's decision thus prevents Oklahoma from taxing the sale of oil and gas by any of the Five Tribes or their members within their newly rediscovered reservations. This could cripple the state's ability to raise revenue, and hamper its development of oil and gas infrastructure.

The decision also advantages oil and gas companies owned by a tribe or by tribal members, and encourages sale of oil and gas operations to tribes for tax advantages. Whereas a tribe-owned oil and gas company would be exempt from state taxes, non-Indian "oil and gas lessees operating on Indian reservations [a]re subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (citing *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949)). As a result, a non-Indian operating an oil well in the new "Indian country" would likely owe taxes to Oklahoma while a tribal member would not.

The Tenth Circuit's decision also raises the possibility that the tribes will seek to impose their own taxes and regulations on non-Indian oil and gas lessees. *See Merrion*, 455 U.S. at 133 (upholding the authority of the Jicarilla Apache Tribe to "impos[e] a severance tax on 'any oil and natural gas severed,

saved and removed from Tribal lands'"); *Kerr-McGee Corp.*, 471 U.S. at 198 (upholding tribal tax on business activity within the reservation, including mineral production); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Montana*, 450 U.S. at 566 (discussing tribes' "inherent power to exercise civil authority" over reservation land held in fee by non-Indians when the fee-holder's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"). For instance, the tribes may attempt to enact zoning ordinances that would affect OIPA's members. *See, e.g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (resolving dispute over validity of Yakima Nation zoning ordinance). This additional tax and regulatory burden could bankrupt producers already operating on thin margins.[3]

3. Designating half the state as Indian country also has implications for the scope of federal regulatory authority over the Oklahoma economy, including the oil and gas industry.

Environmental programs critical to the oil and gas industry have historically been overseen by Oklahoma state regulators. For example, the Safe Drinking and Water Act ("SDWA"), like many other environmental statutes, allows states to assume

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[3] Approximately 10% of the oil produced in Oklahoma comes from wells that produce no more than ten barrels of oil per day during a twelve-month period. *Marginal Wells: Fuel for Economic Growth*, Interstate Oil and Gas Compact Commission, 2015; *see also* Nicole Friedman, *'Strippers' Pose Dilemma for Oil Industry*, Wall Street Journal (September 7, 2015), *available at* https://tinyurl.com/ y7mynqau.

primary responsibility for implementing and administering certain environmental protection programs. *See Phillips Petroleum*, 803 F.2d at 548; *see also* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1174 (1995) (explaining that many environmental statutes, including "the Clean Air Act, the Clean Water Act, RCRA, and the Safe Drinking Water Act" allow for states to implement and administer environmental regulatory programs, with the EPA establishing only "minimum national standards").

The SDWA allows states to assume primary responsibility for regulating the injection of effluents into the ground—a process used to improve oil and gas production. *See Phillips Petroleum*, 803 F.2d at 549. Oklahoma has used this authority to implement a state-wide regulatory regime for underground injection—with the sole exception being the federally overseen Osage mineral trust. *See id.*; n.2, *supra*.

But under the Indian Mineral Leasing Act and Indian Mineral Development Act, the *Secretary of the Interior* has ultimate authority to approve and disapprove mineral mining leases or energy development contracts involving certain Indian lands. *See* Indian Mineral Leasing Act of 1938 ("IMLA"), ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g); Indian Mineral Development Act of 1982 ("IMDA"), Pub.L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–08). And under the SDWA, the EPA may grant a tribe "primary enforcement responsibility" over the water in its tribal territory. *See* 42 U.S.C.A. § 300h-1(e); *Phillips Petroleum*, 803 F.2d at 552 ("The 1986 amendments

to the SDWA resolve any doubt concerning coverage of the SDWA by expressly including Indian tribes."). The Clean Air Act ("CAA") similarly allows the EPA to "delegate[] to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation." *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (citing Tribal Authority Rule, 59 Fed. Reg. 43,956 (1994)).

The Secretary of the Interior and the EPA may thus displace Oklahoma's previously uniform environmental regulation with a patchwork of tribal enforcement plans. Under the SDWA and CAA, all "areas within the exterior boundaries of a tribe's reservation [are] per se within the tribe's jurisdiction" for environmental regulation. *Arizona Pub. Serv.*, 211 F.3d at 1288; *cf.* Pub. L. No. 109-59, 119 Stat. 1144, § 10211(a) (providing that, under certain circumstances, the EPA Administrator may approve a request by Oklahoma to apply its State Implementation Plan under the Clean Air Act to "areas of the State that are in Indian country").

In short, the result of the Tenth Circuit's decision will be replacement of Oklahoma's mature and uniform regulatory scheme with a patchwork of federal, state, and tribal regulation. OIPA's members, which operate in a heavily regulated industry, will bear the brunt of this dramatic shift in regulatory authority.

B. The Cost of This Regulatory Shift and Attendant Uncertainty Will Be Severe and Extensive

The economic consequences of transforming energy regulation in Oklahoma will be severe. An oil

producer operating in what was previously open land may now be faced with a tribe's claim that its wells lie in tribal lands—and that any rights it holds to the land are invalid, because they were never approved under the IMLA or IMDA. *Cf. Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) (finding, in the context of the IMDA, that "language requiring governmental approval of Indian agreements ... has been interpreted to mean that the agreements simply are invalid absent the requisite approval"). A tribe could make such a claim against any pre-existing oil or gas development within the newly reconstituted reservations—even if the developer has never before interacted with the tribe. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 n.3 (1985) (noting that the Court has broadly interpreted the language of predecessor Indian land management statutes to extend the Secretary of the Interior's approval authority to include practically all reservation territory).

Oil and gas producers in eastern Oklahoma will now have to expend significant effort ensuring their compliance with any number of new environmental regulations promulgated by the Five Tribes under the SDWA and CAA. Indeed, some producers with wells scattered across the state could find themselves subject to six separate regulatory regimes—those of the Five Tribes and Oklahoma's. The cost of compliance with these overlapping, duplicative, and possibly conflicting regulations will unavoidably stifle economic activity—and force many smaller and less profitable operators out of business.

Moreover, the Tenth Circuit's decision does not effectuate a clean transfer of authority from the state to the tribes and federal government, and the

uncertainty regarding the boundaries of the competing regulatory bodies will cast a dark cloud over economic activity in Oklahoma.

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache*, 448 U.S. at 142. As a result, case-by-case analysis is required to determine whether "a State [may] assert[] authority over the conduct of non-Indians engaging in activity on the reservation." *Id.* at 144. In these cases, the preemption "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. As a result, the question of what conduct Oklahoma will be allowed to regulate (and how) in the eastern half of the state will be litigated for decades to come.

Tribal authority to tax and regulate non-Indians is similarly indeterminate. Tribal regulation and taxation must be at least "fairly related to the services provided by the Tribe," and here the relevant tribes may rely heavily on established state services and provide few of their own. *Merrion*, 455 U.S. at 157 & n.23. In order to tax the millions of non-Indians who own land within the boundaries of these newly constituted reservations, the Five Tribes will have to show that the non-Indians either (1) "enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) engaged in conduct that "threatens or has some direct effect on

the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565–66; *Plains Commerce Bank*, 554 U.S. at 329. Satisfying these requirements—and demonstrating that any particular tax levied by a tribe is "fairly related to the services provided"—will require fact-dependent and case-specific inquiry. *Merrion*, 455 U.S. at 157.

* * *

It is difficult to overstate the importance of the Tenth Circuit's decision to Oklahoma's economic future, and particularly to the independent oil and gas operators who form the backbone of Oklahoma's energy industry. The extreme importance of the legal question presented in the petition warrants this Court's review.

II. The Tenth Circuit's Decision Was Wrong

The historical record makes clear that Congress had eliminated the boundaries of the Five Tribes' territories by the time of Oklahoma's accession to statehood in 1907. *See* Pet. 23–29. The Tenth Circuit's decision to ignore the Five Tribes' history, and instead mechanically apply this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), is as puzzling as it is incorrect.

The issue in *Solem* was whether a particular surplus land act—the Cheyenne River Act—"diminished the boundaries of the Cheyenne River Sioux Reservation or simply permitted non-Indians to settle within existing Reservation boundaries." *Id.* at 464. The Court recognized that when Congress was enacting the surplus land acts around the turn of the 20th Century, it often failed to specify

"whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.* at 468. The Court thus clarified the "analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470.

But that "analytical structure" has little relevance to this case, because Respondent's habeas petition did not turn on whether any particular surplus land act had diminished the Creek reservation. Rather, the relevant question was whether the Creek reservation existed at all after statehood. As the petition makes clear, it did not. Pet. 23–34.

The Tenth Circuit's focus on *Solem* is also perplexing in light of this Court's clear statement that the reservations of the Five Tribes were unequivocally disestablished at statehood. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), the Court affirmed Oklahoma's authority to tax members of the Five Tribes living on former tribal land, holding that other cases which upheld the immunity of Indian territory from state taxation "do not fit the situation of the Oklahoma Indians." 319 U.S. at 603. Contrasting the situation of the Five Tribes with those of tribes that still had reservations, the Court explained that although "a state might not regulate the conduct of persons in Indian territory," such independent Indian territory is "a condition *which has not existed for many years* in the State of Oklahoma." *Id.* at 602 (emphasis added). Indeed, the Court recognized that the Five Tribes "have no effective tribal autonomy" and that

the members of the tribes "are actually citizens of the State with little to distinguish them" from non-Indians. *Id.*; *cf. McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171 (1973) (Indian sovereignty does not apply "in cases *where Indians have left the reservation* and become assimilated into the general community") (emphasis added).

The Tenth Circuit itself has also stated that the Five Tribes' reservations were disestablished: "In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory *and disestablished the Creek and other Oklahoma reservations*." *Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (emphasis added); *see also Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 597 F. Supp. 2d 1250, 1259 (N.D. Okla. 2009) ("The language of the Oklahoma Enabling Act and its incorporation of the Oklahoma Organic Act support the conclusion that *there are no Indian reservations in Oklahoma*.") (emphasis added), *aff'd sub nom*, *Irby* 597 F.3d 1117.

In short, the Tenth Circuit's erroneous decision, which ignored both history and precedent to overturn the decision of the Oklahoma Court of Criminal Appeals—in the context of deferential AEDPA review—cries out for correction.

CONCLUSION

This Court should grant the petition and reverse the Tenth Circuit's decision.

Respectfully submitted,

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March 9, 2018

No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI FILED FEBRUARY 6, 2018
CERTIORARI GRANTED MAY 21, 2018

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA
(MUSKOGEE)

Civil Docket for Case #: 6:03-cv-00443-RAW-KEW

PATRICK MURPHY

v.

MIKE MULLIN, WARDEN,
OKLAHOMA STATE PENITENTIARY

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
		* * *
03/05/2004	14	PETITION FOR WRIT OF HABEAS CORPUS by petitioner (Additional attachment(s) added on 7/6/2012: # 1 Exhibit a-e, # 2 Exhibit f-k, # 3 Exhibit L-AA)
		* * *
06/14/2004	18	RESPONSE by respondent to [14-1] petition for writ of habeas corpus
		* * *
07/09/2004	20	REPLY by petitioner Patrick Dwayne Murphy to the State of Oklahoma's Response to Petition for a writ of Habeas Corpus by a person in State Custody pursuant to 28 USC 2254.

DATE	NO.	DOCKET TEXT
		(Additional attachment(s) added on 8/10/2015: # 1 Exhibit A - Affidavit of Jeff O'Dell, # 2 Exhibit B - Declaration of Jack Ramsey) # 3 Exhibit C - Hawkins v. Okla order, # 4 Exhibit D - Clayton v. Okla Order, # 5 Exhibit E - Affidavit of David Bourne)
		* * *
09/10/2004	33	FIRST AMENDED PETITION for a Writ of Habeas Corpus by petitioner. (Additional attachment(s) added on 8/10/2015: # 1 Exhibit A - Bednar Letter, # 2 Exhibit B - Affdavit of Eldon Kelough, # 3 Exhibit C - Affidavit of William Hopkins, # 4 Exhibit D - Affdavit of Elizabeth Murphy, # 5. Exhibit E - Affidavit of George Rawlings, # Exhibit E - Affidavit of William Fletcher, # 7 Exhibit G - Affidavit of Dr. Derning)
09/10/2004	34	AMENDED REPLY by petitioner to the State of Oklahoma's Response to Petition for a Writ of Habeas Corpus.
		* * *
12/28/2005	54	SECOND AMENDED PETITION for Writ of Habeas Corpus - 2254 by Patrick Murphy
		* * *
04/06/2007	56	RESPONSE in Opposition to Motion (Re: 54 PETITION for Writ of Habeas Corpus - 2254) by Marty Sirmons

DATE	NO.	DOCKET TEXT
		* * *
05/10/2007	65	REPLY to Response to Motion (Re: 54 PETITION for Writ of Habeas Corpus - 2254) by Patrick Murphy; (With attachments)
05/10/2007	66	Second MOTION to Stay *Habeas Corpus Proceedings* by Patrick Murphy (With attachments)
		* * *
08/01/2007	71	OPINION AND ORDER by Judge Ronald A. White: Substituting Marty Sirmons for Gary Gibson as the party Respondent; denying 54 Petitioner's request for Habeas relief and denying 66 petitioner's Motion to Stay and Abeyance of Habeas Proceedings.
08/01/2007	72	JUDGMENT by Judge Ronald A. White, entering judgment in favor of Respondent Marty Sirmons and against Petitioner Patrick D. Murphy (terminates case)
		* * *
08/30/2007	73	NOTICE OF APPEAL to Circuit Court (Re: 27 Order, 31 Minute Order, 40 Order, 71 Opinion and Order, Ruling on Petition for Writ of Habeas Corpus (2241/2254), Ruling on Petition for Writ of Habeas Corpus (2241/2254), Ruling on Motion to Stay, Adding/Terminating Party(ies), Adding/Terminating Party(ies), 30

DATE	NO.	DOCKET TEXT
		Minute Order, 72 Judgment, Entering Judgment) by Patrick Murphy
08/30/2007	74	MOTION for Certificate of Appealability (Re: 73 Notice of Appeal to Circuit Court) by Patrick Murphy (With attachments)
		* * *
09/04/2007	76	APPEAL NUMBER INFORMATION from Circuit Court assigning Case Number 07-7068 (Re: 73 Notice of Appeal to Circuit Court)
		* * *
09/26/2007	82	ORDER by Judge Ronald A. White, granting 74 Motion for Certificate of Appealability
		* * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Court of Appeals Docket #: 07-7068

PATRICK DWAYNE MURPHY

v.

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
	* * *
09/04/2007	[9510023] Prisoner case docketed.
	* * *
10/01/2007	[9516877] Notification from the District Court that a Certificate of Appealability was granted on three of eleven issues presented to Judge Ronald White. All remaining issues were denied.
	* * *
01/06/2016	[10332385] Case management order filed by Judge Murphy granting issuance of certificate of appealability. Appellant's brief due on 07/15/2016 for Patrick Dwayne Murphy. Appellee's brief due 09/15/2016 for Maurice Warrior, Appellant's optional reply brief due

DATE	DOCKET TEXT
	11/01/2016 for Patrick Dwayne Murphy. The Federal Public Defender for the Western District of Oklahoma is appointed as counsel of record for the appellant.
	* * *
08/05/2016	[10394454] Appellant/Petitioner's brief filed by Patrick Dwayne Murphy in 15-7041, 07-7068.
	* * *
08/12/2016	[10398367] Amicus Curiae brief filed by Muscogee (Creek) Nation and Seminole Nation of Oklahoma.
	* * *
11/04/2016	[10419211] Appellee/Respondent's brief filed by Terry Royal in 07-7068, 15-7041.
	* * *
01/19/2017	[10437571] Appellant/Petitioner's reply brief filed by Patrick Dwayne Murphy in 15-7041, 07-7068.
	* * *
02/15/2017	[10444589] Amicus Curiae brief filed by United Keetoowah Band of Cherokee Indians in Oklahoma in 07-7068 & 15-7041.
	* * *
03/22/2017	[10454850] Case argued by Patti Ghezzi for the Appellant; Jennifer Crabb for the Appellee; David Giampetroni and Klint

DATE	DOCKET TEXT
	Cowan for the Amici Curiae; and submitted to Judges Tymkovich, Matheson and Phillips.
	* * *
08/08/2017	[10488456] Reversed and Remanded; Terminated on the merits after oral hearing; Written, signed, published;. Judges Tymkovich, Matheson (author) and Phillips. Mandate to issue.
08/08/2017	[10488472] Judgment for opinion filed.
	* * *
09/21/2017	[10499945] Petition for rehearing, for rehearing en banc filed by Terry Royal in 07-7068, 15-7041.
	* * *
10/10/2017	[10504660] Amicus Curiae brief filed by United States.
10/24/2017	[10507987] Response filed by Patrick Dwayne Murphy in 15-7041, 07-7068 to Appellee's Petition for Panel Rehearing or Rehearing En Banc.
10/24/2017	[10508182] Response filed by United Keetoowah Band of Cherokee Indians in Oklahoma in 07-7068, 15-7041 to Appellee's Petition for Rehearing En Banc.
10/24/2017	[10508332] Amicus Curiae brief filed by Muscogee (Creek) Nation.
	* * *

DATE	DOCKET TEXT
11/09/2017	[10512372] Order filed by Judges Tymkovich, Matheson and Phillips denying petition for rehearing and petition for rehearing en banc filed by Appellee Terry Royal. Judge Tymkovich has filed a concurrence to this denial. The panel has decided sua sponte to issue an amended decision (attached).
11/09/2017	[10512373] Amended opinion filed by Judges Tymkovich, Matheson and Phillips.
11/09/2017	[10512404] Amicus Curiae brief filed by Oklahoma Independent Petroleum Association in 07-7068, 15-7041.
11/09/2017	[10512447] Amicus Curiae brief filed by Oklahoma Municipal League in 15-7041.
11/09/2017	[10512455] Amicus Curiae brief filed by Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, Oklahoma Farm Bureau Legal Foundation, Oklahoma Oil and Gas Association and State Chamber of Oklahoma in 07-7068, 15-7041.
11/13/2017	[10512852] Motion filed by Appellee Terry Royal in 07-7068, 15-7041 to stay execution of the mandate.
11/16/2017	[10514174] Order filed by Judges Tymkovich, Matheson and Phillips granting the respondent's Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari.

DATE	DOCKET TEXT
	Issuance of the mandate is stayed for 90 days and/or until the deadline passes for filing a certiorari petition in the Supreme Court.
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EXCERPT OF
ANNUAL REPORT OF THE COMMISSION
TO THE FIVE TRIBES (1899)

H. REP. NO. 5, 56TH CONG., 1ST SESS. (1899)

Available online at:

https://advance.lexis.com/api/permalink/8cdb584b-1b5c-4dc4-ba93-51056c966e48/?context=1000516

56TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES { DOCUMENT No. 5.

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1899.

INDIAN AFFAIRS
Part II.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1899.

[9] ANNUAL REPORT

OF THE

COMMISSION TO THE FIVE CIVILIZED TRIBES.

LEGISLATION AND AGREEMENTS.

Since the report made by the Commission, October 3, 1898, no legislation affecting its work other than that making appropriations and providing for appeals in the citizenship cases from the United States courts in Indian Territory to the Supreme Court of the United States, has been enacted by Congress.

The act of Congress June 28, 1898, ratified, in an amended form, the agreement made by the Commission to the Five Civilized Tribes with the Choctaws and Chickasaws on April 23, 1897, and with the Creeks September 27, 1897, to become effective if ratified by a majority of the voters of those tribes at an election held prior to December 1, 1898. Pursuant thereto a special election was called by the executives of the Choctaw and Chickasaw nations to be held August 24, and the votes cast were counted in the presence of the Commission to the Five Civilized Tribes at Atoka, August 30, resulting in the ratification of the agreement by a majority of seven hundred ninety-eight votes. Proclamation thereof was duly made and the "Atoka agreement," so called, is therefore now in full force and effect in the Choctaw and

Chickasaw nations. A copy thereof is hereto appended. (Appendix No. 1, p. 31.)

Chief Isparhecher of the Creeks was slow to call an election, and it was not until November 1, 1898, that the agreement with that tribe (Appendix No. 1, p. 31) was submitted in its amended form for ratification. While no active interest was manifested, the full-bloods and many of the freedmen were opposed to the agreement and it failed of ratification by about one hundred and fifty votes. As a result the act of June 28, 1898 (Appendix No. 1, p. 31) known as the Curtis Act, became effective in that nation.

The Cherokees now began to realize the sensations of "a man without a country," and again created a commission at a general session of the national council in November, 1898, clothed with authority to negotiate an agreement with the United States. The earlier efforts of this commission to conclude an agreement with that tribe were futile, owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer. The commission now cre-

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EXCERPTS OF COMMISSION TO THE FIVE CIVILIZED TRIBES, ANNUAL REPORTS OF 1894, 1895, AND 1896 (1897)

Available online at:

https://digital.libraries.ou.edu/utils/getfile/collection/cornish/id/1557/file name/1558.pdf

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U.S. COMMISSION

TO THE

FIVE CIVILIZED TRIBES.

ANNUAL REPORTS OF 1894, 1895 AND 1896

AND

CORRESPONDENCE WITH THE REPRESENTATIVES OF THE FIVE CIVILIZED TRIBES.

FROM

MARCH 3, 1893, TO JANUARY 1, 1897.

IN THE SENATE OF THE UNITED STATES.

December 10, 1894.–*Resolved*, That the Report of the Commission appointed to negotiate with the Five Civilized Tribes of Indians, known as the Dawes Commission, which report is attached to the Annual Report of the Secretary of the Interior as Appendix B, be printed as a Senate document.

Attest: WM. R. COX,
Secretary.

B.

REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES.

WASHINGTON, D.C., November 20, 1894.

SIR: The Commission to the Five Civilized Tribes, appointed under the sixteenth section of an act of Congress making appropriations for the Indian service approved March 3, 1893, report what progress has thus far been made by it.

Immediately upon receiving their instructions they entered upon their work and made their headquarters, on reaching the Territory, at Muskogee, in the Creek Nation, removing it in March to South McAlester, in the Choctaw Nation, where it still remains.

Upon arriving in the Territory the commission immediately sent to the chief or governor of each

tribe an official notice of their appointment and of their authority and the objects of their mission in accord with their instructions, and requested an early conference with him, or those who might be authorized to confer with this commission, at such time and place as might be designated by him. Such conferences were held separately with the chief and duly authorized commission of each of the tribes. At each of these conferences the commission explained with great pains the wishes of the Government and their authority to enter into negotiations with them for an allotment of their lands and exchange of their tribal for a Territorial government. They were listened to attentively, and were asked many pertinent questions, which were fully answered so far as their authority justified. No definite action was taken at either of these conferences, though the indications were adverse to a favorable result. They all asked for time to consider, and promised a renewal of the conferences.

Afterwards, at the suggestion of one of the chiefs, an international council, according to their custom on important questions, consisting of delegates appointed for that purpose from each of the tribes, except the Seminoles, who took no part in it, was held to confer upon the purposes of this commission. The commission attended this conference, and on request presented the subject to them more elaborately and fully than had been done before. The conference continued three days, and at first the views of the commission were treated with seriousness, and the impression seemed favorable in the body that a change in their present condition was necessary and was

imminent, and that it was wise for them to entertain our propositions. During the deliberations, however, telegraphic dispatches from Washington reached them indicating that the sentiment of the Government, and especially of Congress, from whose action they had most to apprehend, was strongly in favor of what they maintained as "the treaty situation," and that no steps would be taken looking to a change unless they desired it. This put an effectual check upon the disposition to negotiate, and the result at this international conference was the adoption of resolutions strongly condemning any change and advising the several tribes to resist it. Each of the

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[14] ernment, with such other facts as may seem pertinent and will enable the government to take such further action as it may deem wise.

Information, alike accessible to all, must convince you of the earnest desire of the United States to effect a change in the condition of the Five Civilized Tribes, and of the many advantages which would accrue to your people if they shall effect such change by agreement.

We have the honor to be, respectfully yours,

HENRY L. DAWES
MEREDITH H. KIDD
ARCHIBALD S. MCKENNON,
Commissioners.

Hon. JOHN F. BROWN,
Principal Chief, Seminole Nation, Wewoka, Ind. T.

To the above propositions we have not, as yet, received any reply.

SOME EXPLANATIONS.

Early interviews with us by commissioners appointed by the several tribes, and with citizens, satisfied us that the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government, but would insist that if any agreements were made for allotment of their lands it should all be divided equally among them. Among other reasons assigned, it was stated that a cession to the United States would likely make operative and effective the various railroad grants: that they preferred each to sell his share of the lands and receive the money for it, as if ever their lands were converted into money it would go into the hands of the officers of the tribes, who would swindle them out of a large portion of it. Finding this unanimity among the people against the cession of any of their lands to the United States, we abandoned all idea of purchasing any of it and determined to offer them an equal division of all their lands. Hence the first proposition made to each tribe.

An objection very generally urged to allotment of lands was that they would be in possession, when allotted, of non-citizens, whom they could not dispossess without interminable lawsuits, and as the Indians, especially the full-bloods, have a settled aversion to go into our courts, we, to remove this difficulty, submitted the second proposition to each tribe.

There are towns in the Territory ranging in population from a few people to 5,000 inhabitants. Nearly all of them are non-citizens. These towns have not

been surveyed or platted, and streets exist only by agreement and arrangement among the people who constructed them, and are often bent and irregular. Many large and valuable stone, brick and wooden buildings have been erected by non-citizens of these towns, and the lots on which they stand are worth many thousands of dollars. These town sites are not susceptible of division among the Indians, and the only practicable method of adjusting the equities between the tribes who own the sites and those who have constructed the buildings is to appraise the lots without the improvements and the improvements without the lots, and allow the owners of the improvements to purchase the lots at the appraised value, or to sell lot and improvements and divide the money according to the appraisement. Hence, the third proposition to all the tribes, town sites were reserved for disposition under special agreements.

Complaints are made by the Cherokees that many freedmen are on the rolls made under the direction of the Government, and known as the "Wallace Roll," who are not entitled to be there, and many freedmen complain that they have been improperly omitted. The chief of the Cherokee tribe suggested that they might be willing to submit all these disputes to this commission for decision, but it was believed that if an intelligent Cherokee by blood was one of such board, it would give the Cherokee people a knowledge of the good faith and correctness of the decision, and secure their confidence in the conclusions arrived at. Hence, in the eighth proposition to the Cherokees, we propose such board be composed

of two members of this commission and one Cherokee by blood.

The Cherokee tribe is clamorous for the execution of the agreement in regard to intruders contained in the contract heretofore made with that tribe in purchasing the "Outlet," and we have been met by the declaration repeatedly made by those in power, that when that agreement was carried out it would be time to

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[61] in the subject they have in charge induces me to write you a few words concerning their work.

As I said to the Commissioners when they were first appointed, I am especially desirous that there shall be no reason, in all time to come to charge the Commission with any unfair dealing with the Indians, and that, whatever the result of their efforts may be, the Indians will not be led into any action which they do not thoroughly understand or which is not clearly for their benefit.

At the same time I still believe, as I always have believed, that the best interests of the Indians will be found in American citizenship, with all the rights and privileges which belong to that condition. The approach to this relation should be carefully made, and at every step the good and welfare of the Indian should constantly be kept in view, so that when the end is reached, citizenship may be to them a real advantage instead of an empty name.

I hope the Commission will inspire such confidence in those with whom they are to deal that they will be listened to, and that the Indians will see the

wisdom and advantage in moving in the direction I have indicated.

If they are unwilling to go immediately so far as we think desirable, whatever steps are taken should be such as point out the way, and the result of which will encourage those people in further progress.

A slow movement of that kind, fully understood and approved by the Indians, is infinitely better than swifter results gained by broken pledges and false promises.

Yours, very truly,

(Signed) GROVER CLEVELAND.

Not receiving any replies to these letters the Commission addressed to each of the chiefs of these nations a letter bearing date May 18th, 1895, of which the following is a copy:

MUSCOGEE INDIAN TERRITORY, May 18, 1895.

TO THE PRINCIPAL CHIEF OF THE NATION.

SIR: As representing the Commission to the Five Tribes, I took the liberty a few days since to direct to you a copy of a letter from the President of the United States and the Honorable Secretary of the Interior upon the subject of the mission of the Commission to this Territory.

The Commission has also been directed by the President to communicate to you and the chiefs of the other four nations the fact that they have returned to the Territory for the purpose of renewing

their negotiations with the authorities of the several nations in reference to the subject matter committed to them.

They desire to open negotiations with you in accordance with the spirit of the letter of the President heretofore sent to you, and therefore they would be gratified to know at what time and where it will be most agreeable to you to need and confer with them upon that subject, either yourself, personally, or others appointed by you for that purpose.

It is not necessary to enlarge at this time upon the purposes and object which the Commission has in charge. Those have all been heretofore presented to you. It is sufficient at this time to assure you that the Commission have not come here to interfere at all with the administration of public affairs in these nations, or to undertake to deprive any of your people of their just rights. On the other hand, it is their purpose and desire, and the only authority they have, to confer with you upon lines that will result in promoting the highest good of your people and securing to each and all of them their just rights under the treaty obligations which exist between the United States and your nation.

If you and your authorities are willing to confer with the Commission upon these questions and along these lines please indicate to us here in Muscogee, at an early date, when and where and in what manner it would be most agreeable to you to hold such conference.

I have the honor, with much consideration, to be,

Very truly yours,

(Signed) HENRY L. DAWES, Chairman.

EXCERPT OF
SEVENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE TRIBES

H. REP. NO. 5, 56TH CONG., 2D SESS. (1900)

Available online at:

https:// advance.lexis.com/api/permalink/d2309e48-cad7-4945-8ec1-71a426f7e75a/?context=1000516

56TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES { DOCUMENT No. 5.

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1900.

INDIAN AFFAIRS.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
INDIAN INSPECTOR FOR INDIAN TERRITORY.
INDIAN CONTRACTS.
BOARD OF INDIAN COMMISSIONERS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1900.

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SEVENTH ANNUAL REPORT

OF THE

COMMISSION TO THE FIVE CIVILIZED TRIBES

TO THE

SECRETARY OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1900.

[9] PREFATORY.

The Commission to the Five Civilized Tribes was created by act of Congress March 3, 1893, with instructions to enter into negotiations with the several nations of Indians in Indian Territory for the allotment of land in severalty or to procure the cession to the United States of the lands belonging to the Five Tribes at such price and terms as might be agreed upon, it being the express determination of Congress to bring about such changes as would enable the ultimate creation of a territory of the United States, with the view to the admission of the same as a State of the Union. The ever-changing kaleidoscope of human events has wrought during the past seven years in the personnel of the commission, as well as in the territory with which it had to deal, a full quota of changes, involving, aside from the present membership, the appointment of Messrs. Meredith H. Kidd, of Indiana; Thomas B. Cabaniss, of Georgia; Alexander B. Montgomery, of Kentucky; Frank C. Armstrong, of Washington, D.C.; and A. S. McKennon, of Arkansas, whose retirement has been brought about by the vicissitudes of political life, change in legislation, or the demands of private interests.

The results which have thus far been attained, and the means adopted for their attainment, are fully set forth in this and preceding reports. Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the

commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. One has but to contemplate the mineral resources, developed and undeveloped, and existing legislation with reference thereto, to realize the advantages which awaited such a course. When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty—a direct division of their estate with consequent individual ownership of their homes—it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions. Nevertheless the plan adopted by the commission for the administration of this vast estate is not without its advantages; and when its labors, and those of the various officers who have been detailed or appointed to aid in closing the history of these nations shall have been completed, there will have been dissipated one of the most vexatious internal questions with which Congress in recent years has had to deal.

Instead of an arid western plain, occupied by the savage of tradition, as many suppose, the commission found a territory not greatly smaller than the State of Maine, rich in mineral and agricultural [10] resources and in valuable timber; a country which has been occupied and cultivated for over half a century, whose fertile valleys yielded bountiful harvests of southern products, and on whose prairies grazed a quarter of a million cattle yearly; where cities had sprung up; through which railroads had been constructed; and where five distinct modern govern-

ments existed, independent of the sovereignty of the United States.

For diversity, the social and political conditions found here were unexampled. Thousands of white children without the meanest of educational advantages, yet no one of the nations without an institution of learning that would have been a credit to a more advanced civilization; men of Indian blood whose genius would have adorned the halls of Congress or challenged admiration in the *fin de siecle* business world—high minded, able, and politic; and within the same tribes, in no small numbers, those who, when in normal condition, had scarcely sufficient intelligence to realize or express the ordinary wants of man. Men and women, to depict whose characters were to introduce the biographies of patron saints, yet among whose neighbors might be counted some of the most notorious criminals that have infested the western borders. Indeed, the phases of life found here were as variegated as the hues of autumn, and the degrees of intelligence and civilization as widely separate as East from West. Nature, were she to have searched the country from end to end, could have found no more appropriate canvas upon which to display her moods.

The commission's duties have at times been found extremely arduous, yet never uninteresting. It has earnestly endeavored in the course of its labors not to lose an opportunity to secure and retain the confidence, not only of those who have received the benefits of education and society, but of the ignorant full-blood and negro as well, and to impress upon their minds the benefits of civilization and education and

the beneficent advantages of that Government, which, more than any other in the world, affords liberty, protection, peace, and prosperity to its subjects.

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TRESPASSERS ON INDIAN LANDS,

230 OP. ATTY GEN. 214 (1900)

[214]

Trespassers on Indian Lands.

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TRESPASSERS ON INDIAN LANDS.

Under the treaties with the Five Civilized Tribes of Indians no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted.

The provisions of the act of June 28, 1898 (30 Stat., 495), for the organization of cities and towns in said Indian country and the extinguishment of Indian title therein have not yet been consummated, and it is still Indian country. This act does not deprive these Indians of the power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation.

Purchasers of lots do so with notice of existing Indian treaties and with full knowledge that they can only occupy them by permission from the Indians. Such lands are sold under the assumption that the purchasers will comply with the local laws.

Sections 2147 to 2150, inclusive, of the Revised Statutes, expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands, and the grant of this power carries with it the duty of its exercise.

[215]

It is the duty of the Department of the Interior to remove all classes forbidden by treaty or law who are within the domain of the Five Civilized Tribes without Indian permission; to close all businesses which require permit or license and are being conducted without the same; and to remove all cattle which are being pastured on said land without Indian permit or license.

DEPARTMENT OF JUSTICE,

September 7, 1900.

SIR: I have the honor to reply to your note of August 13, 1900, requesting my official opinion upon several questions there stated, arising from conditions now existing in the Indian country occupied by the Five Civilized Tribes of Indians, and which conditions are stated, in substance, thus:

Without referring specially to the tax legislation of these Indian nations, they generally require that persons, not citizens or members of any Indian tribe, who reside or carry on certain kinds of business within their limits, shall procure and pay for a permit of license to do so.

Many persons of this description have bought, under the act of Congress referred to below, lots in the towns and cities in these nations, and many of them are engaged in mercantile, professional, and other kinds of business, and refuse to pay such tax, claiming, among other reasons, that the act of Congress referred to, in authorizing the sale of such lots to persons not Indians or connected with any tribe, has recognized this right to so purchase and to reside and carry on business on said lots, and has exempted them from such tax.

In addition to this, vast herds of cattle, owned by persons not citizens of such nation nor connected with any Indian tribe, are, by their owners, kept and grazed upon the public lands of these nations and the owners refuse to pay the tax imposed on account thereof, and the questions propounded relate chiefly to the power and duty of the Department of the Interior to enforce payment of these taxes, and to remove

from the limits of such nation, as intruders, those who refuse payment thereof. On account of the number of persons, the vast amount of property and the consequences involved, the question is, as you suggest, one of great magnitude and importance.

[216] Without referring specially to the different treaties with these Indian nations, it may be stated that they provide that all persons not citizens of such nations or members of any Indian tribe found within the limits of such nation should be considered as intruders, and be removed from and kept out of the same by the United States. From this class of intruders are excepted the employees of the Government and their families and servants; employees of any internal improvement company; travelers and temporary sojourners; those holding permits from any of the Indian tribes to remain within their limits, and white persons who, under their laws, are employed as "teachers, mechanics, or skilled in agriculture."

It is apparent, therefore, that, save the excepted classes, no one, not a citizen or member of a tribe, can be lawfully within these limits, without Indian permission; and equally apparent that all may be so, with such permission. And it follows that the same power that can refuse or grant such permission can equally impose the terms on which it is granted.

So far as concerns the Choctaw and Chickasaw nations (and the same rule applies to the others), this question was passed upon by my predecessor, Attorney-General Wayne MacVeagh, who held (17 Opin., 134) that such permit and license laws, with their tax, were valid and must be enforced. The

same doctrine was held by Acting Attorney-General Phillips, in 18 Opinions, 34. Both these opinions are cited by the court of appeals of Indian Territory in *Maxey* v. *Wright* (54 S. W. Repr., 807), which distinctly affirms the validity of this legislation. I quite agree with these opinions and have no doubt that it is competent for those Indian nations to prescribe the terms, here being considered, upon which they will permit outsiders to reside or carry on business within their limits.

Nor does the act of June 28, 1898 (30 Stat., 495), either deprive these nations of the power to enact such legislation or exempt purchasers of town or city lots from its operations.

This was also decided in the case last referred to. So far [217] as affects any question here, that statute provides a plan for the organization of cities and towns, for the sale of town and city lots, and the extinguishment of the Indian title. This last has not yet been consummated, but, as said by the court in *Maxey* v. *Wright*, *supra*, decided January 6, 1900, "The Indian title to such lands still remains in them and it is yet their country."

But, however this may be, and, even if the Indian title to the particular lots sold had been extinguished, and conceding that the statute authorizes the purchase of such lots by any outsider, and recognizes his right to do so, the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation. These laws requiring a permit to reside

or carry on business in the Indian country existed long before and at the time this act was passed. And if any outsider saw proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians. I do not say that Congress might not violate its treaty promises and authorize the outside world to enter upon and occupy the lands of the Indians without their consent, but do say that provisions very different from any contained in this act would be required to justify the imputation of any such intention. All that this act does in this respect is to give the consent of the United States to such purchase, with the assumption that the purchaser, if he wishes to occupy, will comply with the local laws, just as in other cases. The United States might sell lands which it holds in a State, but it would be a strange contention that this gave the purchaser any immunity from local laws or local taxation. The case is much like that of a Federal license to manufacture and sell spirituous liquors, which, while good as against the United States, confers no right where such manufacture and sale are forbidden. This act was passed with the full knowledge of these laws of the Indian nations, approved by the President and having the full force of laws, and, had Congress intended to nullify [218] these laws or take away the power to enact them, or to exempt the purchasers of lots, or any other persons, from their operation, it is quite safe to say it would have done so by provisions very different from those in the act of 1898.

The treaties and laws of the United States make all persons, with a few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe, and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes, and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose, and it must be borne in mind that citizens of the United States have, as such, no more right or business to be there than they have in any foreign nation, and can lawfully be there at all only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they have such permission.

As to the power or duty of your Department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this Government is under the most solemn obligation, and for which it has received ample consideration, to remove and keep removed from the territory of these tribes, all this class of intruders who are there without Indian permission. The performance of this obligation, as in other matters concerning the Indians and their affairs, has long been devolved upon the Department of the Interior. This power and duty are affirmed in the two opinions referred to and, as directly, in *Maxey* v. *Wright*, *supra*. In that case it was said, on page 812:

"Upon the whole case we therefore hold that a lawyer who is a white man and not a citizen of the

Creek Nation, is, pursuant to their statutes, required to pay for the privilege of remaining and practicing his profession in that nation, the sum of $25; and if he refuses the payment thereof he becomes, by virtue of the treaty, an intruder, and that in such a case, the Government of the United States may remove him from the nation; and that this duty devolves upon the Indian Department."

[219] And in another place:

"We are of the opinion, however, that the Indian agent, when directed by the Secretary of the Interior, may collect this money for the Creeks. * * * In this case the Indian agent was acting in strict accordance with directions and regulations of the Secretary of the Interior, in a matter clearly relating to intercourse with the Indians."

That the United States has the power to perform its treaty stipulations in this regard can not be doubted; and, as already said, and in the opinions referred to and above quoted, the execution of that power and duty devolves upon the Interior Department.

This power of removal is expressly conferred by Revised Statutes, sections 2147 to 2150, inclusive, with the right to use the military force of the United States, when necessary for its accomplishment. And a power of this nature carries with it the duty of its exercise.

But as to persons other than purchasers of town or city lots residing or carrying on business thereon, no question arises under the above act of 1898, and persons who are pasturing cattle upon, or otherwise occupying part of the public domain of either of these

Indian nations without permission from the Indian authorities, are simply intruders, and should be removed, unless they obtain such permit and pay the required tax, or permit, or license fee.

In one of the questions submitted, you ask whether your Department has "authority in the case of a merchant refusing to pay such tax, to close his place of business or to remove his stock of merchandise beyond the limits of the nation."

To this, I answer: Your Department may and should remove such merchant unless he has a permit to reside or remain there; and close his place of business and his business, unless he has a permit to carry it on, in all places where such permit is required by law. The question of the right to remove his stock of merchandise beyond this limits of the Indian nation is a different and more doubtful one. While he has no right to remain or carry on business there without a permit to do so, his want of right to keep his goods there, or the right of the Department to remove them, [220] is not so clear. While the law excludes him and authorizes his removal, it does not do so expressly, at least as to his goods. And as the whole evil which is sought to be remedied is so done by the removal of the owner and the closing of his business, it is recommended that his goods be permitted to remain if he so desires.

Your question, whither the lands of any Indian nation in which a town or city is situated will cese to be Indian country, etc., when the lands in such town or city are sold, is not one involving any present existing question, or one which I am authorized to answer.

Your last question asks, "What is the full scope of the authority and duty of the Department of the Interior in the premises under the treaties with these nations and the laws of the United States regulating trade and intercourse with the Indians?"

As applicable to the cases here in hand, which is as far as I am authorized to answer the question, and which is designed also as a comprehensive answer to all the other questions save the one last referred to above, it may be said generally that the authority and duty of the Interior Department is, within any of these Indian nations, to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remove all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

In view of the number of persons, the magnitude of the interests involved, and also as tending to a more ready and better adjustment of the difficulties, it is suggested that public notice be first given to all persons residing or carrying on business without an Indian permit or license, where, for such residence or business, such permit is required, that unless such permit or license be obtained by a short day to be named, such persons will be removed, and such business closed; and in case of cattle pastured without permission, [221] where permission is required, such cattle will be removed from within the nation.

I return herewith the printed copy of the Constitution and Laws of the Chickasaw Nation, transmitted with your note.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

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EXCERPT OF
REPORT OF THE DEPARTMENT OF THE INTERIOR,
INDIAN AFFAIRS (1907)

H. DOC. NO. 5, 60TH CONG., 1ST SESS. (1907)

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60TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES { DOCUMENT No. 5.

REPORTS OF THE

DEPARTMENT OF THE INTERIOR

FOR THE FISCAL YEAR ENDED JUNE 30

1907

ADMINISTRATIVE REPORTS
(IN TWO VOLUMES)

VOLUME II
INDIAN AFFAIRS
TERRITORIES

WASHINGTON : GOVERNMENT PRINTING OFFICE :
1907

[7] REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS.

OFFICE OF INDIAN AFFAIRS,

Washington, D. C., September 30, 1907.

SIR: I have the honor to submit herewith the seventy-sixth annual report of the Office of Indian Affairs.

A SESSION'S LEGISLATION.

The Fifty-ninth Congress ended, as it began, with a most striking array of important permanent legislation respecting Indian interests. A quick survey of the last session's work shows statutes providing for the payment, out of an Indian allottee's share of his tribal fund, of taxes on his allotment, where the restrictions on alienation have been removed and such payment will save his home from attachment; permitting white children to attend Indian schools under similar conditions to those surrounding the attendance of Indian children at white schools; putting the sale of the allotment of any noncompetent Indian under the control of the Secretary of the Interior, and the use of the proceeds by the Commissioner of Indian Affairs for the benefit of the allottee or his heirs; furnishing a means for giving to any competent Indian, on his application, his pro rata share of the funds of his tribe, and authorizing the Secretary to apply

part of all of the share of a blind, crippled or helpless Indian to the relief of his necessities; to quiet title to allotments on the Jicarilla Reservation and sell its timber; to open a further part of the Rosebud Reservation; to dispose advantageously of the desert lands of the Southern Ute Indians; liberalizing the law for the allotment of the Indians on the Bad River Reservation; opening a way out of the difficulty hitherto attending the irrigation of the Pima lands; beginning a system of irrigation on the Fort Hall Reservation; taking further steps for winding up the affairs of the Five Civilized Tribes; distributing remnants of funds among a number of Indian tribes and wiping their accounts off the books of the Treasury; removing restrictions from the allotments of all adult mixed bloods of the White Earth Reservation; permitting the Fort Belknap Indians to

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[95] Grateful settlers have subscribed about $200 toward the erection of a suitable monument to mark the burial place of Chief Tendoy, and have asked to have the NE. ¼ of SW. ¼, sec. 28, T. 19 N., R. 24 E., which contains a number of other Indian graves, set apart and withheld from entry. This tract of land is a hill which can not be reached with water, and is not fit for agricultural purposes. The Lemhi Indians heartily join in the wish of the white people, and steps have been taken by the Office to have this land withdrawn from entry and set apart for the desired purpose when the surveys shall have been finished.

THE FIVE CIVILIZED TRIBES.

No change has been made in the management of the affairs of the Five Civilized Tribes during the year. Mr. Tams Bixby, who succeeded the Commission to the Five Civilized Tribes as sole commissioner, continued in charge until June 30, 1907, when he resigned, and J. George Wright, who for nine years had been inspector for the Indian Territory, was appointed commissioner, combining the duties of his new office with those of the inspectorship.

EDUCATION.

By an act of Congress approved April 26, 1906 (34 Stat. L., 137), the Secretary of the Interior assumed control and direction of the schools among the Five Civilized Tribes.

The direct charge of these institutions rests in, and the work is administered through, John D. Benedict, superintendent of schools in Indian Territory, assisted by four United States supervisors. The Creek, Cherokee, Choctaw and Chickasaw nations are represented by tribal supervisors, who act in conjunction with the United States supervisors. School matters in the Seminole Nation are administered through the supervisor for the Creek Nation.

The amount of money available for school purposes in the several nations is as follows:

Cherokee Nation	$120,476.45
Creek Nation	83,143.62
Choctaw Nation	124,967.35
Chickasaw Nation	145,471.89

Seminole Nation	23,788.00
Total tribal fund	497,847.31

In the Indian appropriation act of June 21, 1906 (34 Stat. L., 340), the Congress allowed $150,000 for maintaining, strengthening and enlarging the tribal schools, and made provision for the attendance of children of parents of other than Indian blood therein, and the establishment of new schools under the control of the Department of the Interior.

[96] This appropriation, supplemented by a part of the tribal funds and by surplus court fees, was used in the establishment of 1,000 day schools, to which citizen and noncitizen children were admitted on equal terms. The schools had an enrollment of about 13,500 Indian pupils, 45,000 white, and 8,600 negro. Although there is no compulsory school law in the Territory and parents frequently do not appreciate the necessity of compelling attendance, the number enrolled is indicative of the wisdom of the Congress in providing for those who are deprived of the ordinary public schools. Nearly all these one thousand rural schoolhouses have been built by popular subscription. Superintendent Benedict says:

> Immediate statehood will not affect educational conditions in the rural portions of this Territory, for the reason that nearly all of the farm lands are still owned by Indians and are not taxable. The State can not remove restrictions, nor can it maintain rural schools except by local taxation. It will therefore be highly necessary that Congress continue its annual appropriation in support of these country schools until the farm lands become subject to taxation. As the country is rapidly filling up with white tenant farmers, this appropriation should be gradually increased to meet the ever-increasing demand for more schools.

Speaking generally, the academies and boarding schools have been crowded to overflowing. Great improvement has been made in the curriculums by the introduction of industrial training and the rudiments of agriculture. The "summer normals" established by the superintendent have been of immense benefit to the teachers of the Territory and have enabled him to obtain a corps of very efficient instructors.

The following tables give statistical information concerning schools in the several nations:

Tribal schools.

Name of school.	Enrollment.	Average attendance.	Time at school.	Annual cost.	Average cost per pupil.
			m. d.		
Cherokee schools.					
Male Seminary	128	108	9 0	$14,436.03	$133.69
Female Seminary	180	153	9 0	19,568.39	128.70
Orphan Asylum	73	67	12 0	10,781.73	160.62
Colored High School	50	43	9 0	5,014.18	116.61
157 primary combined day schools [a]	[b] 9,697			47,354.16	
Total	10,128	370		97,031.47	
[97] *Creek schools.*					
Eufaula High School	91	64	9 0	8,599.40	134.06
Wetumka Boarding	109	77	9 0	8,587.68	111.53
Wealaka Boarding	53	39	9 0	5,369.49	137.69
Eufaula Boarding	87	70	9 0	7,673.24	109.62
Coweta	45	37	9 0	4,517.58	122.09
Creek Orphan Home	70	51	9 0	7,151.15	140.22
Nuyaka	109	71	9 0	5,599.81	78.76
Tullahassee Boarding	97	69	9 0	7,306.81	105.89
Pecan Creek Boarding	54	44	9 0	3,664.21	86.55
Colored Orphan Home	39	31	9 0	3,574.64	115.32
22 primary combined day schools [c]	[c] 1,534			6,260.01	

Total	2,278	553	.....	68,303.97	.....

[a] 21 are negro schools.
[b] 4,447 are white pupils and 1,279 are negro pupils.
[c] 3 are negro schools.
[d] 1,126 are white pupils and 225 are negro pupils.

Tribal schools—Continued.

Name of school.	Enrollment.	Average attendance.	Time at school.	Annual cost.	Average cost per pupil.
			m. d.		
Choctaw schools.					
Jones Academy	139	109	9 0	$18,022.49	$166.87
Armstrong Academy	115	96	9 0	16,154.29	170.05
Tuskahoma Academy	120	105	9 0	17,220.72	164.96
Wheelock Academy	110	103	9 0	15,982.69	155.17
Murrow Indian Orphan Home	82	79	9 0	8,468.64	108.57
Durant	90	71	9 0	5,724.61	80.62
Big Lick	31	20	6 0	840.02	42.00
Chickaloktak	40	28	9 0	1,767.98	63.14
Goodland	80	54	8 0	3,030.82	57.98
International School for the Blind and Deaf	4	3	12 0	823.37	274.46
60 primary combined day schools [a]	3,486	.....	.....	17,949.64	.....
Total	4,290	665	.....	106,085.27	.....
Chickasaw schools.					
Bloomfield Seminary	49	24	6 15	5,336.19	231.05
Harley Academy	68	35	8 0	6,530.90	186.59
Collins Institute	56	33	8 15	6,067.27	183.85
Rock Academy	43	24	7 15	5,231.30	217.98
Chickasaw Orphan Home	72	51	8 0	10,124.91	198.22
Stonewall	20	23	9 0	2,316.31	105.29
Solvidge Business College	22	16	8 0	1,612.81	100.77
Hargrove	74	55	9 0	5,906.48	107.39
St. Agnes Academy	26	21	9 0	2,187.66	104.17
Tishomingo Preparatory	2	2	5 0	98.60	49.30
St. Elizabeth's Convent	20	18	9 0	1,653.96	91.89

El Meta Boud	7	5	9 0	558.79	111.76
69 day schools	4,777			19,925.84	
Total	5,241	306		67,518.51	
Seminole schools.					
Mekusukey	110	78	8 0	8,643.48	110.81
Emahaka	102	77	7 0	7,969.92	103.77
4 day schools	327			1,149.00	
Total	539	155		17,762.40	

* 2,497 are white pupils.

Private and denominational school statistics.

School.	Location.	President or principal.	When established.	Enrollment.		
				White.	Indian.	Total.
Cherokee Academy	Tahlequah	W. J. Pack	1885	105	57	162
Cumberland	Cumberland	W. S. Graves	1887	110	6	116
Dwight Mission Industrial	Marble City	F. J. Schaub	1820	36	60	96
Hargrove College	Ardmore	J. M. Gross	1895	132	87	219
Indian University	Bacone	W. C. Farmer	1880	92	62	155
Indianola College	Wynnewood	F. J. Stowe	1902	66	43	109
Lutheran Mission	Oaks	N. L. Nielsen	1903	28	36	64
Spaulding College	Muskogee	T. F. Brewer	1887	182		182
St. Elizabeth's Institute	Purcell	M. Patricia	1889	71	71	142
Sacred Heart	Vinita	C. Van Hulse	1887	94	138	232
Total				913	563	1,476

Support of schools from special funds.

Name of fund.	Number of day schools.	Enrollment.		Cost.
		Indian.	White.	
Indian schools, Five Civilized Tribes	[a] 486	5,160	26,296	$134,069.89
Indian schools, Five Civilized Tribes, surplus court fees	[b] 197	710	11,634	49,132.41

[a] 71 are negro schools, with an enrollment of 3,107.
[b] 28 are negro schools, with an enrollment of 810.

[98] MINERAL LEASES.

A list of approved leases and a résumé of the amendments to the regulations governing Creek and Cherokee mineral leases were given in my last report. The regulations were further revised on June 11, 1907. Three important modifications are:

Instead of the requirement that a lessee show $5,000 cash on hand for the development of each lease, or $40,000 for the maximum acreage, 4,800 acres, a lessee is required to be vouched for, on his application for a lease, by two officers of separate national banks, or by one national-bank officer and the manager of an oil well supply company, or by "some other commercial enterprise with which the applicant has had extensive business relations;" but the Department reserves the right to make further inquiry at any time as to his standing and business ability.

On a gas well that tests in twenty-four hours 3,000,000 cubic feet or less the royalty is $150 per annum, and, where the capacity exceeds that, $50 additional per annum for each 1,000,000 cubic feet or fraction thereof; and except in emergencies, which in no case shall consume more than ten days, a lessee is not allowed to utilize more than 75 per cent of the capacity of a gas well.

The required forms of leases are now printed by the Government and are sold by the United States Indian agent at $1 per set, so that now it is not necessary to examine the leases as to substance, but only to see that the blank spaces are properly filled.

Up to the close of the last fiscal year 14,584 mineral leases, nearly all oil and gas, had been filed with the Union Agency, of which 9,575 have been forwarded for departmental consideration and 5,009 are pending at the agency; 14,423 covered oil and gas, 118 coal and asphalt, and the other 43 miscellaneous minerals; 4,886 leases, covering about 663,000 acres, have been approved.

Prior to the passage of the act of April 26, 1906 (34 Stat. L., 137), the Department had no jurisdiction of the approval of mineral leases in the Choctaw and Chickasaw nations; but under that act the Department is required to approve all mineral leases entered into by full-blood citizens of those nations and also of the Seminole Nation. Previously, mineral leases in the Seminole Nation could be made with the tribal government with the consent of the allottee and the approval of the Department, one half of the royalty to be paid to the tribal government until its expiration and the other half to the allottee. The tribal government of the Seminole Nation has not yet been extinguished, and the question as to whether it is entitled to one-half the royalty accruing from minerals extracted from land allotted to citizens of less than full blood is pending before the Department.

[99] The current Indian appropriation act (34 Stat. L., 1026) provides that—

the filing heretofore or hereafter of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice.

Prior to this legislation there had been some doubt as to whether such filing was constructive notice.

The oil fields of the Creek and Cherokee nations were rapidly developed during the year, and the production has materially increased. There has not been much development in the Choctaw, Chickasaw, and Seminole nations, but the prospecting there indicates the ultimate discovery of new fields which will result in many thousands of acres of land being developed for oil and gas purposes. Approximately 21,717,000 barrels of oil were produced in the Indian Territory during the last fiscal year, and it is estimated that on the 30th of June 18,000,000 barrels were stored in tanks in the Creek and Cherokee nations.

Many Indians who have allotments in the productive fields receive each month royalties in very large amounts, many from $300 to $400 per month, several more than $2,000, and one more than $3,000 per month. In addition to the royalties, lessees offer large bonuses for leases on tracts within the developed oil fields, the largest cash bonus being $43,000, paid for a lease on 20 acres within what is known as the Glenn Pool; a bonus of $25,000, in addition to a royalty of 12½ per cent, was paid for a 160-acre lease on the allotment, also in the Glenn Pool, of Ernest Clayton, a deceased Creek citizen.

DEPOSITS IN BANKS.

The money accruing from the sale of Creek allotted lands and the royalties arising from lands of minors and incompetents is deposited at interest in selected banks, which are required to give bond, in a sum equal to the amount of the deposits, for the payment of the deposits and the agreed rate of interest. The amounts deposited during the year and the balances on hand at the close of the last fiscal year, as reported by the Indian agent, are as follows:

Deposits in banks.

Name of bank.	Location.	Deposited during year.	Balance on hand.
Bartlesville National Bank	Bartlesville	$13,336.74	$48,969.10
The First National Bank	do	37,687.56	24,936.49
The American National Bank	do	14,396.82	9,280.11
The First National Bank	Tulsa	43,227.73	47,566.97
The Commercial National Bank	Muskogee	23,646.50	14,249.78
The First National Bank	do	44,594.71	39,799.50
Do	Tahlequah	26,522.20	22,296.97
Do	Vinita	32,516.27	23,535.85
Do	Nowata	22,832.60	23,939.23
The Nowata National Bank	do	28,548.42	24,947.53
Total		287,311.55	279,524.03

[100] LEASING AND SALE OF LANDS.

Since the promulgation of the regulations of July 10, 1903, 867 tracts of land in the Creek Nation have been sold, with the approval of the Department, aggregating 73,379.42 acres, which brought $1,153,748.39, a little more than $15.72 per acre.

No change has been made in the law with reference to the sale of Choctaw and Chickasaw coal and

asphalt lands; but in accordance with the act of June 21, 1906 (34 Stat. L., 325), the Department is having the lands explored with a view to determining their mineral resources and values, for which the act authorizes the expenditure of not exceeding $50,000 of any funds of the Choctaw and Chickasaw nations in the Treasury.

No surplus lands in any of the nations have been offered for sale. No such action can be taken until allotments have been made to all of the citizens of the nation to which the surplus belongs.

INCORPORATING TRIBES.

In my last report I devoted a short passage to the consideration of a plan I had in mind for administering the estates of any Indian tribe who owned property of enough value to make it worth while, by incorporating the tribe as a joint stock company, with such safeguards in the act of incorporation as would protect the individual shareholders from their own improvidence and the company as a whole from a careless directorate. When the concrete problem of the disposal of the mineral-bearing lands of the Choctaws and Chickasaws became acute during the last session of Congress, the Hon. Moses E. Clapp, Senator from Minnesota and chairman of the Senate Committee on Indian Affairs, introduced this bill (S. 8286):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created a corporation, to be known as the Choctaw-Chickasaw Coal, Oil and Asphalt Land Company, the purpose of which is to take title to, manage, and dispose of the coal, oil, and asphalt lands and deposits in the Choctaw and Chickasaw nations for the use and benefit of the persons whose names

shall appear on the citizenship rolls of the Choctaw and Chickasaw nations finally approved by the Secretary of the Interior, and who are, under existing law, entitled to share in the distribution of the funds arising from the sale of the lands and deposits segregated by written order of the Secretary of the Interior, on March twenty-fourth, nineteen hundred and three, by virtue of and in accordance with the provisions of section fifty-eight of the act of Congress approved on July first, nineteen hundred and two (Thirty-second Statutes at large, page six hundred and forty-one), and of any other lands or deposits in the Choctaw and Chickasaw nations that may have been segregated in like manner by order of the Secretary of the Interior or by act of Congress or added by direction of any act of Congress to any existing coal or asphalt lease theretofore made in accordance with law and in the royalties, rents, and profits accruing therefrom.

[101] SEC. 2. That the permanent officers of the corporation shall be: The President of the United States, ex officio president; the Secretary of the Interior, ex officio treasurer and transfer agent, and the Commissioner of Indian Affairs, ex officio secretary; and these officers, together with the Secretary of the Treasury and the Secretary of Commerce and Labor, shall be ex officio directors of the corporation, and they and two persons elected by the stockholders of the corporation, one of whom shall be a Choctaw and the other a Chickasaw by blood, shall constitute the board of directors thereof; and until such time as the citizenship rolls of the Choctaws and Chickasaws have been completed and finally approved by the Secretary of the Interior said directors shall be elected by the persons whose names appear on the approved partial rolls, and their terms of office shall expire ninety days from the date on which the final rolls are approved. Should any ex officio director be unable, for any reason, to attend a meeting of the directors or perform any of the duties required of him by this act, he shall authorize some person connected with the Government of the United States to represent him, such authority to be in writing and to be made a part of the permanent records of the corporation; and the acts of the person so authorized shall be held to be the acts of the ex officio director represented. The term of office of the members of the board of directors elected by the stockholders shall be four years, and until their successors are elected and qualified; and

the ex officio members of the board of directors shall not be entitled to pay for their services, nor shall there be any liability on the part of the directors, ex officio or others, for the debts of the corporation.

SEC. 3. That the principal office of the corporation shall be the office of the Secretary of the Interior, in the city of Washington, District of Columbia, and the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are hereby authorized, with the approval of the Secretary of the Interior, for and on behalf of the citizens of the Choctaw and Chickasaw nations, respectively, to convey to the corporation legal title to said segregated coal and asphalt lands and deposits; and if the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, or either, fail, refuse, or neglect to convey to the corporation title to the property, as provided herein, the Secretary of the Interior may, with the approval of the President of the United States, convey to the corporation title to the segregated lands and deposits, and either conveyance, made and approved as herein provided, shall vest full legal title to the segregated lands and deposits, and all right, title, interest, and equity of the Choctaw and Chickasaw nations and the citizens thereof in and to the lands and deposits, in the corporation, in trust, for the purposes set forth in this act.

SEC. 4. That the corporation shall have authority to explore for, mine, produce, purchase, sell, and transport coal and asphalt, both crude and refined; to prospect for, extract, refine, and transport oil; to lease, for the mining of coal and asphalt, and the extraction of oil, any of the deposits in or under the segregated lands, and to lease or sell and convey the surface of any of them, whether within the limits of incorporated or unincorporated town sites or otherwise, in tracts not exceeding one hundred and sixty acres to any one purchaser, on such terms and conditions as the board of directors may determine; to collect all royalties, rents, and profits arising from any of the segregated lands heretofore leased for coal and asphalt mining purposes and from any deposits in or under them hereafter leased, and all rents and profits derived from the surface of any of the segregated lands that may be leased for agricultural, grazing, or other purposes; to borrow money; to purchase, own,

sell, and convey real estate; to mortgage property; to purchase mortgages, bonds, and stocks; to issue bonds of the corporation; to sue and be sued; to adopt by-laws not inconsistent herewith, and to do and perform any and all other acts necessary or incident to carrying into effect the purposes of this act. The surface of the land shall be [102] leased and sold subject to the right of future lessees of coal, asphalt, and oil deposits to remove the coal, asphalt, and oil in or under the land without being accountable to the owner of the surface because of subsidence of the surface or other damage incident to removing coal, asphalt, or oil, or operating coke ovens. A majority of the board of directors shall constitute a quorum and shall have authority to transact the business of the corporation.

SEC. 5. That this act shall be in effect for not exceeding twenty-five years from the date of the approval hereof, unless extended by Congress; and the capital stock of the corporation shall be in an amount to be fixed by the board of directors, divided into such number of shares as will enable the board of directors to issue to each citizen of the Choctaw and Chickasaw nations, in the Indian Territory, whose name shall appear on the citizenship rolls finally approved by the Secretary of the Interior, a certificate for his per capita share of the capital stock of the corporation. It shall be unlawful for a citizen owner to sell, transfer, or assign any interest or use in his stock, directly or indirectly, or to encumber it in any way, without the written consent and approval of the Secretary of the Interior, as transfer agent of the corporation, indorsed thereon.

SEC. 6. That the capital stock of the corporation and the segregated coal and asphalt lands and coal, asphalt, and oil deposits shall not be subject to taxation by any State, Territorial, district, county, municipal, or other government while the title to the stock remains in the Indians, and the title to the coal and asphalt lands and coal, asphalt, and oil deposits remains in the corporation, except that the stock in the corporation shall be subject to taxation for school purposes only, by the proper officials of the county or counties in which the lands and deposits are situate, at the same rate and on the same conditions as personal property of citizens in such county or counties is taxed; and the tax thus levied shall be a charge against the income of the corporation and be paid by the board of directors therefrom.

After all expenses of managing the corporation have been paid and such amount reserved as surplus as the board of directors may deem proper, the income of the corporation shall be distributed, in the form of dividends, to the holders of stock in the corporation, at such times as the board of directors may direct.

SEC. 7. That the first meeting of the ex officio directors of the corporation shall be held at such time as the President of the United States may direct, but not later than sixty days from the date of the approval of this act.

SEC. 8. That Congress shall have power to continue the provisions of this act beyond the period of twenty-five years; and if at the expiration of twenty-five years from the date of the approval hereof the provisions of the act have not been continued by Congress the affairs of the corporation shall be wound up by the board of directors and the property distributed by them in accordance with the interests of the respective stockholders.

SEC. 9. That the right to at any and all times amend, modify, or repeal this act is hereby reserved by Congress.

SEC. 10. That all acts and parts of acts inconsistent with this act are hereby repealed.

This bill embodies in all respects my incorporation plan as applied to these particular tribes. In the House, almost simultaneously, the Hon. James S. Sherman, Representative from New York and chairman of the House Committee on Indian Affairs, introduced a bill containing substantially the same provisions, but constituting the officers of the corporation as follows:

The Secretary of the Interior, ex officio president; the Commissioner of Indian Affairs, ex officio secretary and treasurer and transfer agent; * * * [103] together with three directors, appointed by and to serve during the pleasure of the President of the United States, * * * and two persons elected by the stockholders of the corporation, one of whom shall be a Choctaw and the other a Chickasaw by blood.

The shortness of the session and the temporary provision made for the administration of the affairs

of the Five Civilized Tribes prevented the Congress from giving any particular consideration to either measure; but I am in hope that at the coming session it may be taken up seriously and examined and compared on its own merits with the various other projects mooted for making at once the most prudent and the most profitable disposal of the income-producing property of the Choctaws and Chickasaws.

COLLECTION OF REVENUES.

By law it is made the duty of the Government to collect the taxes and royalties belonging to the several tribes, and the responsibility of making such collection devolves upon the United States Indian agent. During the fiscal year just ended he reports the handling of funds as follows:

RECEIPTS.

Choctaw and Chickasaw nations:		
Coal royalty	$227,385.03	
Asphalt royalty	2,814.20	
Condemnation town lots	287.45	
Condemnation of lands for railway purposes	7,411.71	
Sale of seized timber	132.90	
Quarterly payment right of way St. Louis and Santa Fe Rwy. Co	3,000.00	
Rent of jail at Tishomingo	150.00	
Sale of seized furs	7.65	
Grazing fee	12,064.50	
Town lots	389,589.61	
Individual Indian moneys, oil and gas	32.84	
		$652,875.89
Choctaw cattle tax		9.60

Cherokee Nation:

Oil and gas royalty (individual)	568,835.34	
Coal royalty (individual)	2,176.48	
Limestone and shale royalty (individual)	2,060.00	
Oil-lease bonus (individual)	811.00	
School revenue (board of teachers and pupils)	9,050.21	
Taxes on pipe lines	233.85	
Improvements former orphan asylum lands	80.00	
Sale of property, Cherokee Orphan Asylum	419.35	
Sale of estray stock	228.48	
Stone and ballast	322.76	
Ferry charters	140.00	
Grazing fee	365.90	
Town-lot payments	146,582.22	
		731,315.60

[104] Creek Nation:

Oil and gas royalty (individual)	$181,256.93	
Coal royalty (individual)	12,921.56	
Clay and shale royalty (individual)	300.00	
Oil-lease bonus (individual)	7,096.00	
Taxes on pipe lines	34.76	
Occupation tax	133.13	
Grazing fee	12,802.65	
Town-lot payments	22,701.96	
		$237,245.99

Miscellaneous:

Sale of town-site maps	210.80
Overpayments, advanced royalty, Creek and Cherokee	10,291.48
Total moneys actually collected by Indian agent	1,631,949.36
Amount received by agent to cover disallowances	247.67

Received by Treasury warrants on requisition	1,379,852.73
	3,012,049.76
Balance "individual Indian moneys" carried over from previous fiscal year	47,902.36
Balance "overpayments, advance royalty, Creek and Cherokee," carried over from previous fiscal year	343.90
Total	3,060,296.02

The amount actually disbursed by him was $1,989,127.09 leaving a balance of $1,071,168.93, which was on deposit with the subtreasury at St. Louis, Mo., or in the United States Treasury.

The total amount collected as royalty on coal and asphalt in the Choctaw and Chickasaw nations, from June 28, 1898, to June 30, 1907, was $1,975,972.61.

TOWN SITES.

Town-site work is substantially finished, there being but few supplemental schedules to be approved in cases where the lots were in contest and could not be scheduled to the parties entitled. Several small towns, however, have sprung into existence on the segregated coal and asphalt lands, and it is the purpose of the Office to attempt to obtain legislation during the coming session of the Congress which will authorize the sale of the surface of the land to actual occupants. If authorized, this will not involve much work or any considerable expense.

PUBLIC ROADS.

The Creek and Cherokee agreements declare that public highways shall be established on all section lines, and during last year the agent received 196 petitions asking that obstructions be removed from section lines. The cost of establishing roads has been

small, and many allottees have waived claims for damages.

Public highways in the Choctaw, Chickasaw and Seminole nations are established along section lines in accordance with the act of April [105] 26, 1906 (34 Stat. L., 145). The agent reports that he received during the year 812 petitions from persons residing in these nations, and that 1,582 miles of road have been established and ordered opened. As a general rule, tenants and others residing in the different nations have cooperated with the Government in carrying out the law.

PLACING ALLOTTEES IN POSSESSION OF THEIR ALLOTMENTS.

Under the agreements with the Five Civilized Tribes it is the duty of the agent, on the issuance of an allotment certificate, to place the allottee in possession and to remove from the land all persons objectionable to him. The agent reports that there has been a material decrease in the number of complaints during the last year. The number of written complaints received was 1,002, to which should be added 216 carried over from last year; 2,077 other complaints were disposed of without formal hearing, and 875 formal cases were heard and adjusted.

The agent experienced some difficulty in placing Cherokee allottees in possession of lands formerly held by freedmen who had been denied citizenship. Every obstacle was placed in his way and suits were brought to enjoin him from removing the intruders. Judge Joseph A. Gill, of the northern district of the Indian Territory, issued a temporary injunction, but after a hearing the injunction was dissolved. It is es-

timated that some 2,000 persons who applied for enrollment as Cherokee freedmen are occupying lands allotted to enrolled citizens, and they will have to be ejected.

ALIENATION OF ALLOTMENTS.

By the act of April 21, 1904 (33 Stat. L., 204), all restrictions were removed from the alienation of lands allotted to citizens of the Five Civilized Tribes who are not of Indian blood, except homesteads and the lands of minors, and authority was granted to the Secretary of the Interior to use his judgement as to removing restrictions on the alienation of the surplus allotments of adult Indians. The following table shows the record up to June 30, 1907:

Approved applications for removal of restrictions on alienation of allotments.

Nation.	Number of applications.	Acreage.	Estimated value.
Choctaw	1,460	189,149.76	$4,817,098.24
Chickasaw	537	62,299.46	1,988,368.00
Cherokee	2,787	178,267.11	6,206,146.00
Creek	516	58,012.14	2,096,066.00
Seminole	12	1,059.00	34,775.00
Total	5,302	488,787.47	15,041,453.24

[106] In addition to the foregoing the Department has authorized the alienation of tracts of land for town sites in accordance with applications made under the act of March 3, 1903 (32 Stat. L., 996), as follows:

Lands alienated for town sites.

Nation.	Number of appli-	Acreage.	Estimated

	cations.		value.
Choctaw	24	1,893.66	$144,069.08
Chickasaw	9	614.00	38,744.35
Cherokee	24	991.64	77,199.43
Creek	66	3,729.00	288,618.35
Total	122	7,228.30	548,631.21

Under the same act and under the act of June 21, 1906 (34 Stat. L., 339), allottees have been authorized to sell all or parts of their allotments in lots and blocks for town-site purposes, as follows:

Allotted lands alienated for town sites.

Nation.	Number of applications.	Acreage.	Estimated value.
Choctaw	13	1,084.17	$341,748.25
Chickasaw	3	225.86	60,523.75
Cherokee	39	1,274.96	348,559.50
Creek	53	2,790.10	721,361.50
Total	108	5,375.07	1,472,193.00

Adult Creek allottees, with the consent of the Secretary of the Interior, have the right under section 16 of the act of July 30, 1902 (32 Stat. L., 500), to sell the lands allotted to them, exclusive of their homesteads, and the following sales have been made:

Number of tracts	867
Number of acres	73,379.42
Appraised value	$866,965.68
Amount for which sold	$1,153,748.39

PROTECTION OF FULL BLOODS.

It came to my knowledge that many full-blood Indians of the Indian Territory were giving deeds covering their surplus lands and were receiving in re-

turn very much less than their reasonable value. Therefore on March 4 I issued a circular letter addressed to "Every full-blood Indian citizen" of the Five Civilized Tribes, and had 25,000 copies of it distributed. The letter was printed on one side of the sheet in English and on the reverse side in the languages of the five tribes respectively. The full bloods were told that in winding up their affairs and distributing the property of the respective nations among their citizens the Government was doing everything in its [107] power to save for them the property which was rightfully theirs; they were warned that they were in great danger of losing their lands because educated persons were preparing to take advantage of their ignorance of the law and thereby obtain possession of their allotments; and I advised them no to sign any paper of any kind, if it was presented by a person other than a Government officer, without first consulting the nearest representative of the Government in whom they had confidence. I quoted from the act of April 26, 1906 (34 Stat. L., 144), the clause—

> Every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions * * * is hereby declared void;

and told them that any paper affecting their allotments, which had been signed before the restrictions on the alienation of the land were removed, was of doubtful validity, and that they should pay no heed to anyone who pretended that he had an agreement with them for conveying their lands, for whoever had taken wrongful advantage of their ignorance well knew what the law was, and consequently had no

cause for complaint if by disregarding it he lost money.

On the same date I addressed a circular letter to all agents, teachers, inspecting officers and other persons in the Government service stationed among the Five Civilized Tribes, notifying them that their future standing with this Office would depend upon the heartiness of their cooperation in protecting the full-blood Indians from robbery of their homes and lands. Agent Kelsey was instructed to have 1,000 mimeograph copies of the circular made and to send one, with several copies of the letter to the full bloods, to every Government official in the Indian Territory.

INTERMARRIED CHEROKEES.

The act of June 28, 1898 (30 Stat. L., 495), provides that the Commission to the Five Civilized Tribes shall make rolls of the different tribes, enrolling, among others, "such intermarried white persons as may be entitled to citizenship under Cherokee laws." Early in 1903 a controversy arose as to the right of white persons intermarried with Cherokees to participate in the distribution of the tribal estate, and on February 24, 1903, the Department referred the subject to the Court of Claims for findings and opinion, in accordance with section 2 of the act of March 3, 1883 (32 Stat. L., 485).

Before any action was taken the act of March 3, 1905 (33 Stat. L., 1048), became law, which authorized the Court of Claims to render final judgement in the case and provided that either party feeling aggrieved by its judgment should have the right to ap-

peal [108] to the Supreme Court of the United States. On May 15, 1905 (40 Ct. of Cls., 411), the court rendered the following decision:

That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation, and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose.

On appeal, the Supreme Court of the United States on November 5, 1906, affirmed the decision of the Court of Claims. Afterward bills were introduced in the House and Senate providing for the enrollment of such white persons as prior to December 16,

1895, were intermarried with Cherokees, Shawnees or Delawares by blood, in accordance with the laws of the Cherokee Nation, and declaring that they should have the same status as other citizens of the tribe, but should first pay into the Treasury of the United States for the benefit of the Cherokee Nation $325 each, and should avail themselves of the privilege of enrollment within six months from the approval of the act. On January 4 the Office reported on Senate bill S. 6122, one of those referred to, and opposed the proposed legislation because it was doubtful whether there was enough Cherokee land to give an allotment to each person entitled to enrollment exclusive of the intermarried whites.

Believing that they were entitled to intermarried citizenship and that they had a right to share in the distribution of the Cherokee estate, many intermarried whites had made improvements on Cherokee lands in good faith, and the question arose as to whether they should be protected in the value of their improvements. The subject was brought to my attention by the President, and I expressed the opinion that intermarried whites not entitled to enrollment, who had [109] in good faith prior to December 16, 1895, made permanent and valuable improvements on Cherokee lands, should be allowed a reasonable time within which to dispose of them to citizens of the nation who were entitled to select allotments, and at a valuation to be fixed by some officer of the Government. I submitted a draft of a bill to carry this into effect, which became a law on March 2, 1907. (34 Stat. L., 1220.) Intermarried whites were allowed until May 2, 1907, to dispose of their

improvements, and the Commissioner to the Five Civilized Tribes was selected as the officer to fix the valuation at which they should be allowed to sell them to enrolled Cherokees. Most of them sold their improvements, and, on the whole, it is considered that the action taken by the Congress was equitable and just.

CHOCTAW-CHICKASAW FREEDMEN.

Article 3 of the treaty of April 28, 1866 (14 Stat. L., 769), authorizes the Choctaw and Chickasaw nations to adopt their freedmen, and provides that, when the land is allotted, the freedmen and their descendants shall be given "forty acres each of land of said nations, on the same terms as the Choctaws and Chickasaws." On October 26, 1883, the principal chief approved an act of the national council of the Choctaw Nation adopting the freedmen, which was held by the Department to be a substantial compliance with the act of May 17, 1882 (22 Stat. L., 73), and the treaty of 1866.

On January 10, 1873, the Chickasaw legislature likewise passed an act adopting the freedmen of that nation in accordance with the treaty. The act was forwarded to the President, who laid it before the Speaker of the House of Representatives on February 10, 1873. It was referred to the Committee on Freedmen Affairs, but no further action was taken on the subject until August 15, 1894, when the Congress passed an act (28 Stat. L., 286) approving the Chickasaw act of 1873 which adopted the freedmen. Meanwhile, on October 22, 1885, the Chickasaw legislature had repealed that act.

The right of the freedmen to share Choctaw and Chickasaw lands without compensation to the nations was afterwards passed on by the Court of Claims and the Supreme Court of the United States, which were given jurisdiction of the case by the Choctaw – Chickasaw supplemental agreement. The Supreme Court declared that under the supplemental agreement, "and not independent thereof," the Chickasaw freedmen were entitled to land of the value of 40 acres of the average allottable land, and that the Choctaw and Chickasaw nations were entitled to compensation from the United States for such land in accordance with the agreement. (See 193 U. S., 115).

Many persons enrolled as Choctaw and Chickasaw freedmen have taken the position, through their attorneys, that those who were in [110] part of Choctaw or Chickasaw Indian blood were entitled to enrollment and to share in the estate of the nations as Indians by blood. A person enrolled as a Choctaw or Chickasaw freedman receives land of only the value of 40 acres of the average allottable land and does not share in the funds of the tribes; while one enrolled as a citizen by blood is given an allotment of the value of 320 acres of the average allottable land of the two nations and will have his share of the tribal funds. In the case of Joe and Dillard Perry, who are of Chickasaw Indian and freedman blood, it had been held by the assistant attorney-general for the Interior Department that if they made application for enrollment as Chickasaw citizens by blood within the time prescribed by law they were entitled to enrollment as such. Their names had been placed

on the Chickasaw freedman roll; but when it was shown that their applications had been properly made their names were transferred to the blood roll of the nation. Afterward, in accordance with the opinion of the Attorney-General of February 19, 1907, their names were retransferred to the freedman roll. Apparently taking this case as a precedent, the attorneys representing the Choctaw and Chickasaw freedmen procured the introduction into the Congress of a bill directing the Secretary to transfer from the freedman rolls to the blood rolls the name of any person of Indian blood on either the mother's or the father's side, as shown by the tribal rolls, the records of the Commission to the Five Civilized Tribes, or those in the Department. It was provided, however, that no original application for enrollment could be made, but that only those enrolled or who had applications pending for enrollment as Choctaw and Chickasaw freedmen should be entitled to the benefits of the proposed legislation. Office report of January 3 on the bill said, in substance, that whatever rights the freedmen had were based on the treaty of 1866 and subsequent action by the Congress and the tribal authorities; that it had always been the understanding of the Office that persons whose mothers were freedwomen were recognized by the tribes as belonging to the freedmen, regardless of the quantum of Indian blood; that during slavery a child followed the status of the mother, a child born of a free mother being free and one born of a slave mother being a slave; that it was the universal custom among the white people of this country to regard as a negro any person known to be in part of negro

blood irrespective of the degree of such blood; that the Choctaw and Chickasaw nations had been fairly generous to their former slaves and their descendants by allowing them to participate to a limited extent in the allotment of land—something which former white slave owners had not done; and that for nearly half a century the freedmen had been allowed to occupy and cultivate lands belonging to the tribes without rental. The legislation was not enacted.

[111] Early in February, 1907, Bishop W. B. Derrick and others, in behalf of the Choctaw and Chickasaw freedmen, filed with the President a memorial and a draft of a proposed bill to authorize suit to be brought in the Court of Claims, by the freedmen or their attorneys of record, against the Choctaw and Chickasaw nations and the Government, to determine their right in the lands of the Choctaw and Chickasaw nations with right of appeal to the Supreme Court by either party. The delegation asked that, if the President could not recommend the proposed legislation, the subject be referred to the Attorney-General for opinion. This was done, and the Attorney-General, on February 27, after discussing the subject at length, said:

> To hold that descendants of Indians and negroes who were always recognized by the tribal authorities as freedmen, and never as citizens, are entitled, simply because of their Indian blood, to be placed upon the rolls of citizens, would be entirely inconsistent with the previous action of the Government in this matter and in complete disregard of the rolls, customs, and usages of the tribes. There would be no end to the claims that could be made if everyone who had some Choctaw and Chickasaw blood was to be deemed a "descendant," within the meaning of the treaty of 1830, without regard to tribal recognition and enrollment or to the legitimacy of his "descent."

* * * * * * *

The Government has been for more than ten years engaged in the work of allotment of Indian lands and enrollment of Indian citizens among the Five Civilized Tribes; it has given every class of claimants to these privileges every reasonable opportunity to assert their claims, and to thus overturn its whole system and policy at the very last moment to let in these claimants would be, in my opinion, both inexpedient and unjust. I advise that you do not recommend legislation referring such claims to the Court of Claims or otherwise recognize them.

On April 13, 1907, certain attorneys, on behalf of Bettie Ligon and about 2,000 others who have been enrolled as freedmen but are in part of Indian blood, filed a complaint in equity in the United States court for the southern district of the Indian Territory against the chief executives of the Choctaw and Chickasaw nations and the Secretary of the Interior, with a view to securing a decree of the court declaring them entitled to an equal undivided interest with all persons in the grant resulting to the Choctaw and Chickasaw nations from the treaty of 1830, for which patent was issued March 23, 1842. The attorneys representing the nations and the Secretary demurred, on the ground, among others, that the court did not have jurisdiction. On May 18, 1907, Hon. Hosea Townsend, judge for the southern district, sustained the demurrer and dismissed the bill for want of jurisdiction. The case was taken to the court of appeals for the Indian Territory, but as no two judges were able to agree as to the nature of the decree which should be rendered, the judgment of the lower court stood. The case is now pending, on appeal, in the United States circuit court for the eighth circuit.

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WELFARE OF INDIANS OF OKLAHOMA

S. REP. NO. 1232, 74TH CONG., 1ST SESS. (1935)

74TH CONGRESS, 1st Session. } SENATE { REPORT No. 1232

WELFARE OF INDIANS OF OKLAHOMA

JULY 29 (calendar day, AUGUST 12), 1935.—Ordered to be printed

Mr. THOMAS of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2047]

The Committee on Indian Affairs, to whom was referred the bill, (S. 2047) to promote the general welfare of the Indians of the State of Oklahoma, and for other purposes, having considered same, report it back to the Senate with the recommendation that all after the enacting clause be stricken and that the sections substituted be passed.

That the United States, acting through the Congress, hereby readmits, reacknowledges, and assumes continued responsibility for the guardianship of our Indian citizens and, in exercising such guardianship, does hereby pledge such Indian citizens of all tribes that it is and will be the continuing policy of the Government to establish justice for and to promote the general welfare of the Indians of the United States.

SEC. 2 Pursuant to the general policy set forth in section 1 hereof, the Government, acting through the Congress, hereby

declares it to be for the best interest and general welfare of the Indians of Oklahoma to provide a plan whereunder all Indians may be accorded all rights, opportunities, and privileges and may eventually assume full responsibility as citizens in the said State and Nation. Pursuant to such policy the following specific things to be done are hereby set forth:

(a) The restricted lands, funds, or other property of the Indians of the State of Oklahoma, as herein provided are to be retained in the custody of the Secretary of the Interior, in trust, save as provided in this Act, but nothing herein contained shall be construed as reimposing restrictions on any such property from which the restrictions have previously been removed.

(b) The restricted lands, funds, or other property belonging to competent adult Indians, as herein provided for, shall be relieved by the Secretary of the Interior of all restrictions as rapidly as the best interests of such Indians will permit and justify.

(c) The Government hereby declares its policy to be that the aged, infirm, and incompetent Indians shall have every possible care, assistance, and protection and that the Indian youth shall have educational facilities and advantages to the end that they may assume their place among the citizenship of the State and Nation.

(d) All claims held by any Indian tribe, group, or band against the Government shall be considered and adjudged, and such amounts as may be found to be due any such tribe, group, or band shall be paid and expended as may be provided by law.

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WELFARE OF INDIANS OF OKLAHOMA

[6] this authority shall be expended under the direction and supervision of the Secretary of the Interior: *Provided*, That specific authority is hereby granted to appropriate funds for—

(a) General support and civilization, including education:

(b) For relief of distress and conservation of health;

(c) For industrial assistance and advancement and general administration of Indian property;

(d) For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects;

(e) For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, and other employees;

(f) For the suppression of traffic in intoxicating liquor and deleterious drugs; and

(g) For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

SEC. 15. The Secretary of the Interior is hereby authorized to prescribe such rules and regulations as may be necessary to carry out any of the provisions of this Act.

SEC. 16. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SEC. 17. This Act may be cited as the "Oklahoma Indian General Welfare Act of 1935."

During the last session of Congress a bill known as the "Wheeler-Howard Act" was passed proposing new legislation for the Indian citizens of the entire United States. The total Indian population is about 300,000, scattered through some 20 States. However, Oklahoma is the home of some 50 tribes, embracing some 140,000 Indians.

In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.

Under the Oklahoma constitution and our laws, all Indians are full citizens and enjoy all the right extended to white citizens. The Wheeler-Howard bill was evidently prepared having in view the large Indian reservations located in the western and southwestern States. The Oklahoma Indians having made progress beyond the reservation plan, it was thought best not to encourage a return to reservation life.

Inasmuch as the Indians of Oklahoma present many and varied problems, special consideration has been given to such State and as the result of such study, Senate bill 2047 was prepared and is now pending before the Congress for consideration.

Very briefly the new bill provides, among other things, the following:

The President will be given power to extend restrictions upon Indian land from time to time within his discretion. Under an old law the President has power now to extend restrictions on a large number of Indian lands in the State. On other lands restrictions must be extended from time to time by the Congress. This makes it necessary for the Indians to appear before the Congress and make a fight to have their period of restrictions extended from time to time, and, inasmuch as it is the policy to protect the ownership of Indian lands in their owners, for the time being, it appears best to settle this matter by permitting the President to control the matter of restrictions, at least during the immediate future.

****

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Statehood for the Territories

H. Rep. No. 496, 59th Cong., 1st Sess. (1906)

59TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES { REPORT No. 496.

STATEHOOD FOR THE TERRITORIES

JANUARY 23, 1906.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. HAMILTON, from the Committee on the Territories, submitted the following

REPORT

[To accompany H. R. 12707.]

The Committee on the Territories, to whom was referred H. R. 12707, to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States, and to enable the people of New Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States, report same back to the House of Representatives, and recommend that it do pass.

ANALYSIS OF BILL.

This bill, under a single title and enacting clause, enables two States to be admitted into the Union.

It consists of 43 sections, the first 18 of which relate to the proposed State of Oklahoma, the area of which is to comprimise the present Territory of Ok-

lahoma and the Indian Territory; and the remaining 17 sections relate to the proposed State of Arizona, the area of which is to comprise the present Territories of New Mexico and Arizona.

The whole bill is drawn to conform as nearly as may be to the language of previous enabling acts, and contains such provisions as may in their nature be common to all, besides such additional provisions as are made necessary by existing laws, Indian treaties, and local conditions.

The sections framed to provide similar objects for each of the proposed new States are made to conform as nearly as may be to each other.

[9] Having come from the South, their sympathies were naturally with the South in the civil war, although many Indians in the northern part of the Territory kept faith with the Federal Government.

In 1865 and 1866 treaties of peace were made with the Indians whereby they acknowledged the sovereignty of the United States and agreed to abide by the Federal laws.

In 1866 certain of the Indians ceded the use of their lands west of the present line of the Indian Territory to the Government for the occupancy of certain tribes of friendly Indians, and in 1889 the Creek and Seminole sold their interest in these lands outright to the United States. Thereupon followed the organization of original Oklahoma and the addition thereto of territory as hereinbefore described.

Meanwhile white people have been emigrating to the Indian Territory in constantly increasing numbers until now, when the Dawes Commission estimates the number of white people in the Indian Ter-

ritory at about 700,000, of whom only about 70,000 are estimated to be Indians.

In 1893 the Commission to the Five Civilized Tribes, commonly called the Dawes Commission, was created. For the first five years of its existence, down to the passage of the so-called Curtis law, the Commission was given only the power of negotiation, except that under the law of June 10, 1896, they were given limited authority in relation to citizenship rights.

By the Curtis Act, however, its authority was extended so that the Commission to the Five Civilized Tribes now has authority for the "extinguishment of the national or tribal title to any lands within that Territory (the Indian Territory) now held by any or all of such nations or tribes, either by cession of the same, or some part thereof, to the United States, or by allotment and division of the same in severalty among the Indians of such nations or tribes."

The act of June 10, 1896, empowered the Commission to determine applications for citizenship presented within ninety days from the date of the act, and even under that law "applications embracing approximately 75,000 claimants were judicially determined."

The business of the Dawes Commission, as finally defined by various statutes and Indian agreements supplemental thereto, was "to administer upon five great estates," composed of about $10,000,000 of trust funds and 19,511,889.39 acres of land, as follows:

Choctaw Nation	6,950,043.66
Chickasaw Nation	4,703,108.05
Cherokee Nation	4,420,070.13
Creek Nation	3,072,813.16
Seminole Nation	365,854.39

This business did not relate to the disposition of wild lands or lands of uniform value. "It related to vast tracts, covered by the houses and other improvements of a great population, threaded in every direction with railroads, filled with villages and large towns of the most modern character," and without a wigwam or blanket Indian within the limits of the Territory.

It became the duty of the Commission to determine—

First. Who were the bona fide citizens entitled to possess these properties; and

Second. To take an inventory of the properties to be divided, and to apportion them equitably in severalty.

[10] THE PEOPLE AND THEIR CONDITION.

Aside from the population which has been attracted to the Territory, there are five distinct classes of people having common property and citizenship rights, but differing widely in racial characteristics, viz:

1. The so-called full-blood Indian.
2. People of mixed blood ranging from an almost infinitesimal infusion of Indian blood to nearly full-blood Indians.
3. Intermarried whites.

4. Negroes, called freedmen, who were slaves or are the descendants of former slaves of Indians.

5. Adopted citizens.

According to the recent Bonaparte report these five classes constitute about one-fifth of the inhabitants of the Territory, and of them "at least three-fourths are Indians in little more than name, with from 75 to 99 per cent of white blood, and in great majority altogether indistinguishable in appearance, language, and manners from white people."

These people of mixed blood are, as a rule, intelligent, educated, and competent to manage their own affairs.

The remaining four-fifths of the inhabitants of the Territory have no connection whatever with the tribes and are white people, with a small percentage of negroes, attracted from the various States of the Union, whose citizenship in the States from which they came has qualified them for statehood.

It therefore appears that of the whole population of the Indian Territory scarcely one-twentieth are full-blood Indians.

By the Curtis Act and various agreements with the five nations, tribal courts were abolished July 1, 1898, and all tribal relations and governments of the five nations are to cease March 4, 1906.

The government of Indian Territory at present is a government by the Secretary of the Interior, by four Federal judges having jurisdiction in four several districts, and by various commissioners, which courts and commissioners administer the Federal law together with an extension of a part of the Ar-

kansas Code. This government is known in Indian Territory as "court government."

Indian Territory is without adequate schools, so far as white people are concerned, and is without asylums for the deaf, dumb, blind, and insane.

The only provision for free schools in the Territory is in the Curtis Act which provides for free schools in the incorporated towns.

Outside the incorporated towns the various Indian governments maintain schools, but it is asserted that at least 100,000 white children outside incorporated towns are without free educational opportunities, and that a large white population is growing up in ignorance.

ALLOTMENT.

As to the inventory of "properties to be divided" by the Dawes Commission. Nothing is owned in common in the Indian Territory except the lands and tribal funds. The act of June 28, 1898, known as the Curtis Act, provided for "the making of rolls of citizens and the allotment of lands in the five nations in the Indian Territory;" and pursuant to the provisions of that law various agreements and supplemental agreements have been made with the Five Civilized Tribes providing for the allotment of lands, the divisions of tribal [11] funds, and the abolishment of tribal governments after March 4, 1906. Under this law "and the agreements with the tribes, and acts of Congress amendatory and supplementary thereof, the Commission has proceeded to made rolls of citizens of each of the tribes, appraise the land preparatory to allotment, estimate timber, set apart land for town sites over a large part of the Territory, subdi-

vide the United States Geological Survey sectional survey into quarter sections and in some places quarter-quarter sections, make improvement plats of the land surveyed, and to allot the land to the individual members of the tribes." The Commission was also authorized to segregate coal lands in the Choctaw and Cherokee country.

According to the Tenth Annual Report of the Commission to the Five Civilized Tribes, "the survey and appraisement work of the Commission is finished."

As to coal and asphalt lands the Dawes Commission reports that the lands segregated under the provisions of the act approved July 1, 1902, cover an area of 444,863.03 acres. These lands are not subject to allotment.

As to the progress of the Commission in the enrollment of citizens and the allotment of lands, the so-called Bonaparte report, transmitted to Congress by the President March 7, 1904, is as follows:

> In the Seminole Nation the roll has been completed and finally approved by the Secretary of the Interior.
>
> In the Creek Nation the enrollment work is 97½ per cent completed.
>
> In the Choctaw, Chickasaw, and Cherokee nations the enrollment work is between 90 and 95 percent completed.
>
> All of the land in each nation has been appraised and valued in tracts of 40 acres, and where timber of commercial value was found on the land the timber on each 40 was estimated and valued.
>
> Approximately 12,000 sectional improvement plats have been made and are now used in the different land offices, and this work has been completed as far as it is deemed necessary to carry it.
>
> In the Seminole Nation all selections of allotments have been made, and the only work remaining to be done in that na-

tion is the disposing of surplus lands, for which no provision of law exists, and the issuing of deeds.

In the Creek Nation practically all allotments have been made, and more than 60 per cent of the allottees have received allotment and homestead deeds to their lands. These deeds are prepared by the Commission, and, when executed, recorded by it.

In the Choctaw and Chickasaw nations approximately 45 per cent of allotments have been made.

In the Cherokee Nation approximately 25 per cent of allotments have been made. Under instructions from the Secretary of the Interior all proceedings looking to the allotment of land in the Cherokee Nation have been suspended since October 7, 1903, in accordance with the act of Congress relative to the segregations of lands, to await the decision of the then pending suit in the United States Supreme Court between the Delawares and Cherokees.

Allotment-selection contests are being kept well up in the different nations. This involves in each case, of which there are already between 2,000 and 3,000, practically a court trial to determine title to improvements on land.

No statement is attempted to be made of the incidental work that has arisen in the different nations from time to time, much of which has, however, been of considerable magnitude.

It will be seen, therefore, at this time that the work for which the Commission was created, and which has been its constant aim during its existence, namely "the extinguishment of the national or tribal title to any lands within that territory," is well advanced toward completion. The work in the Seminole Nation is complete as far as is possible to complete it under existing legislation. The work in the Creek Nation is substantially finished. It is estimated that the work in the Choctaw and Chickasaw nations will be ended by March 31, 1905, and in the Cherokee Nation by July 1, 1905. And when all tribal title to land in Indian Territory shall have been extinguished, and final disposition made of all of the affairs of the Five Tribes, the work will have cost the Government less than 10 cents per acre.

No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX
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PETITION FOR CERTIORARI FILED FEBRUARY 6, 2018
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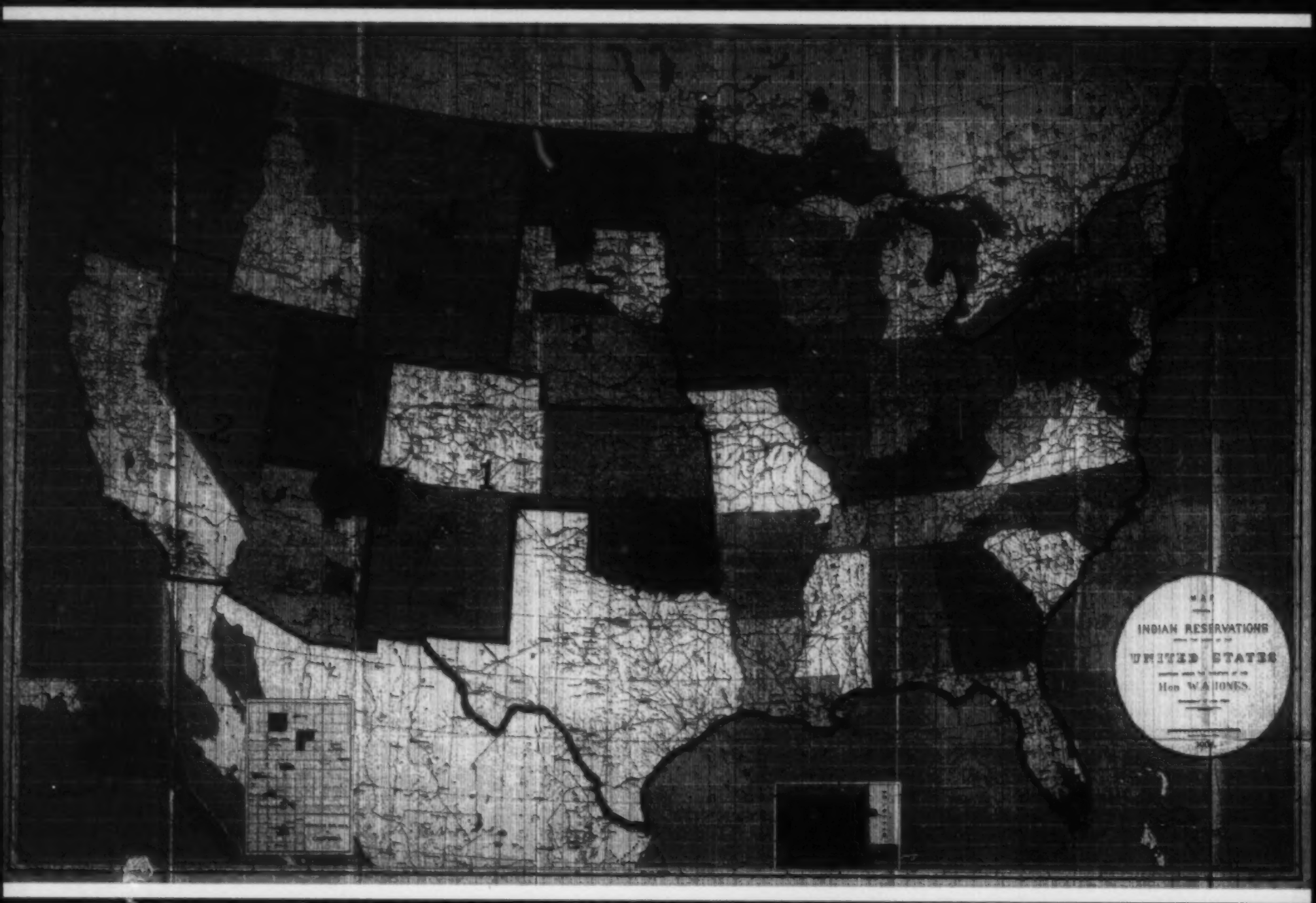
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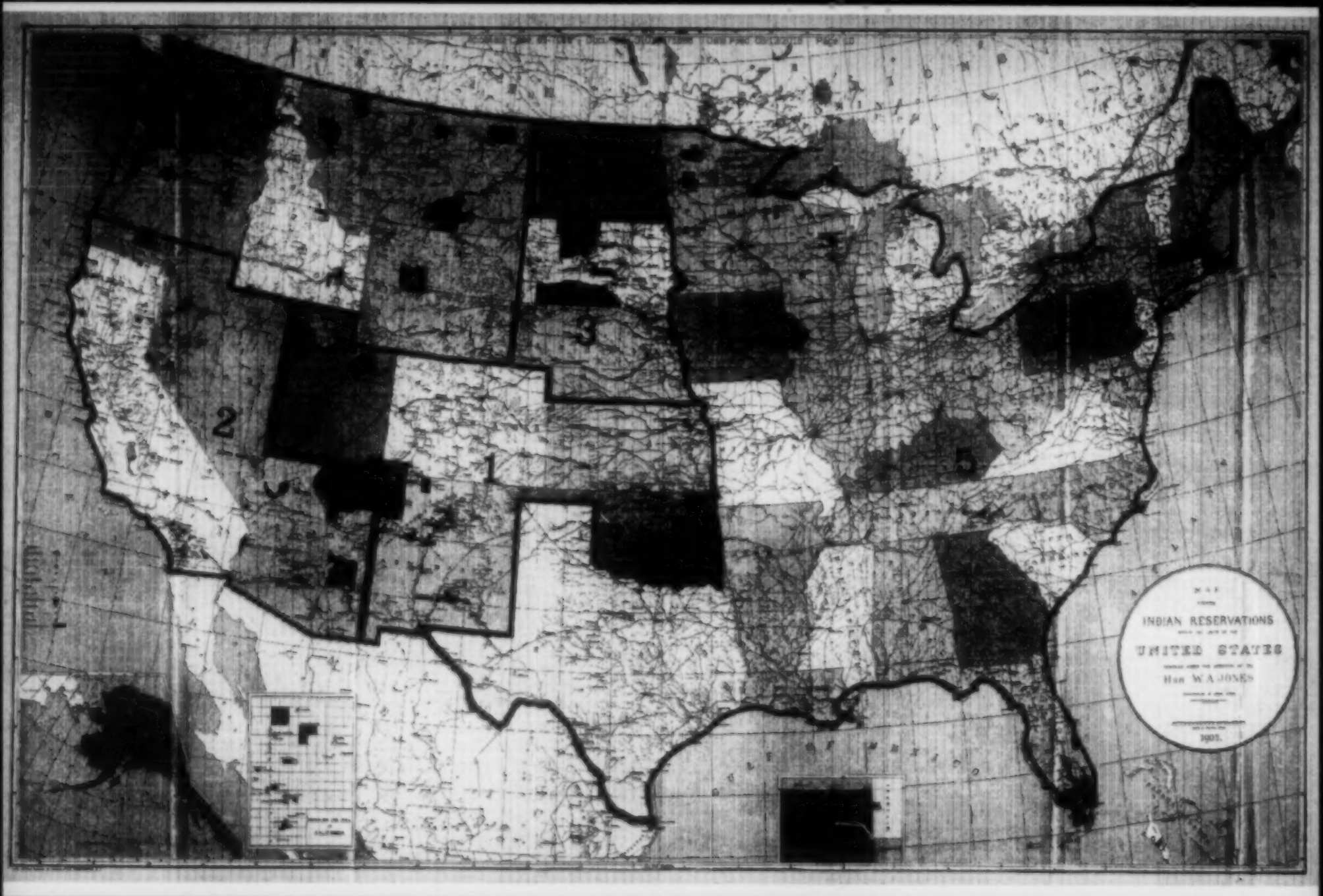
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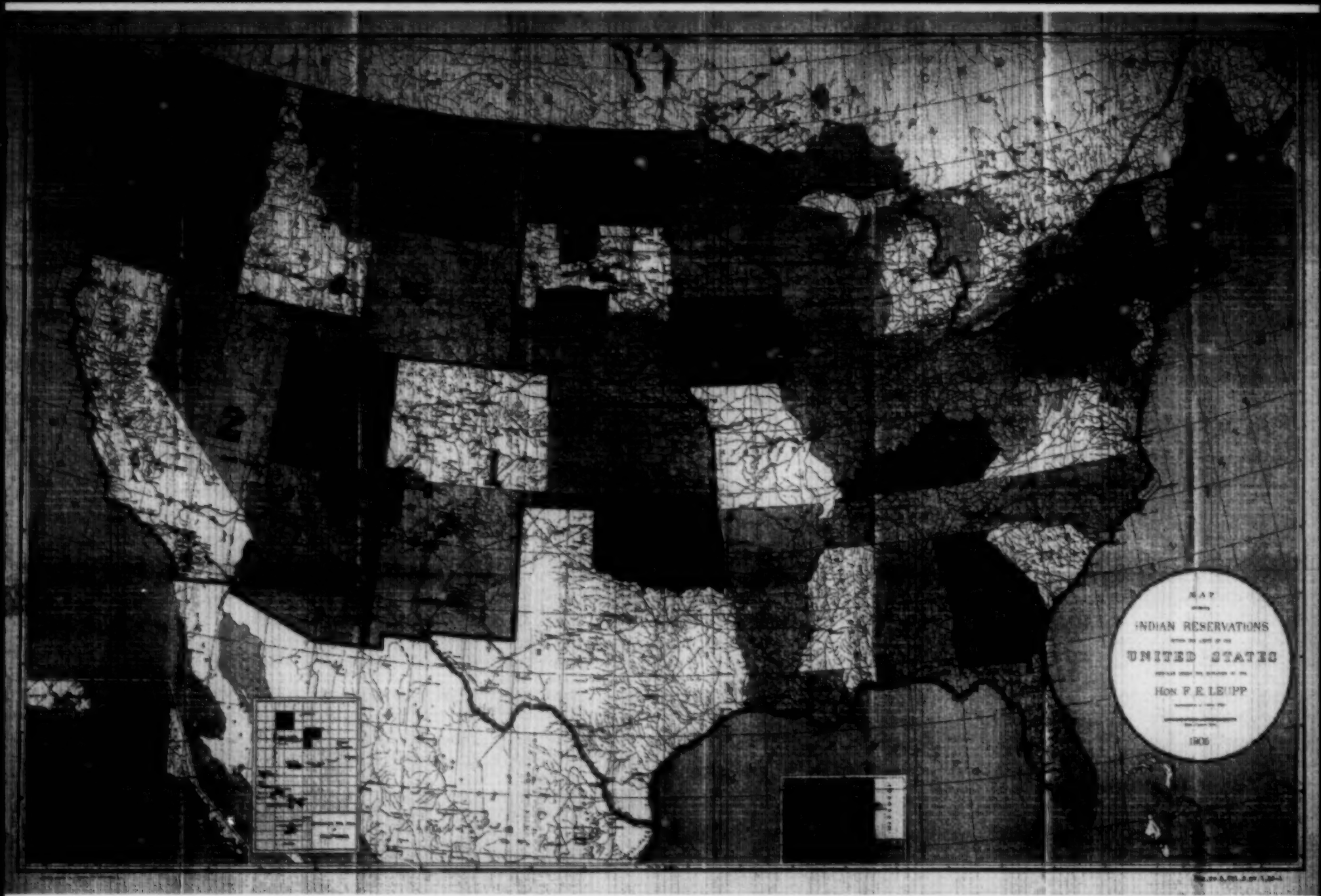
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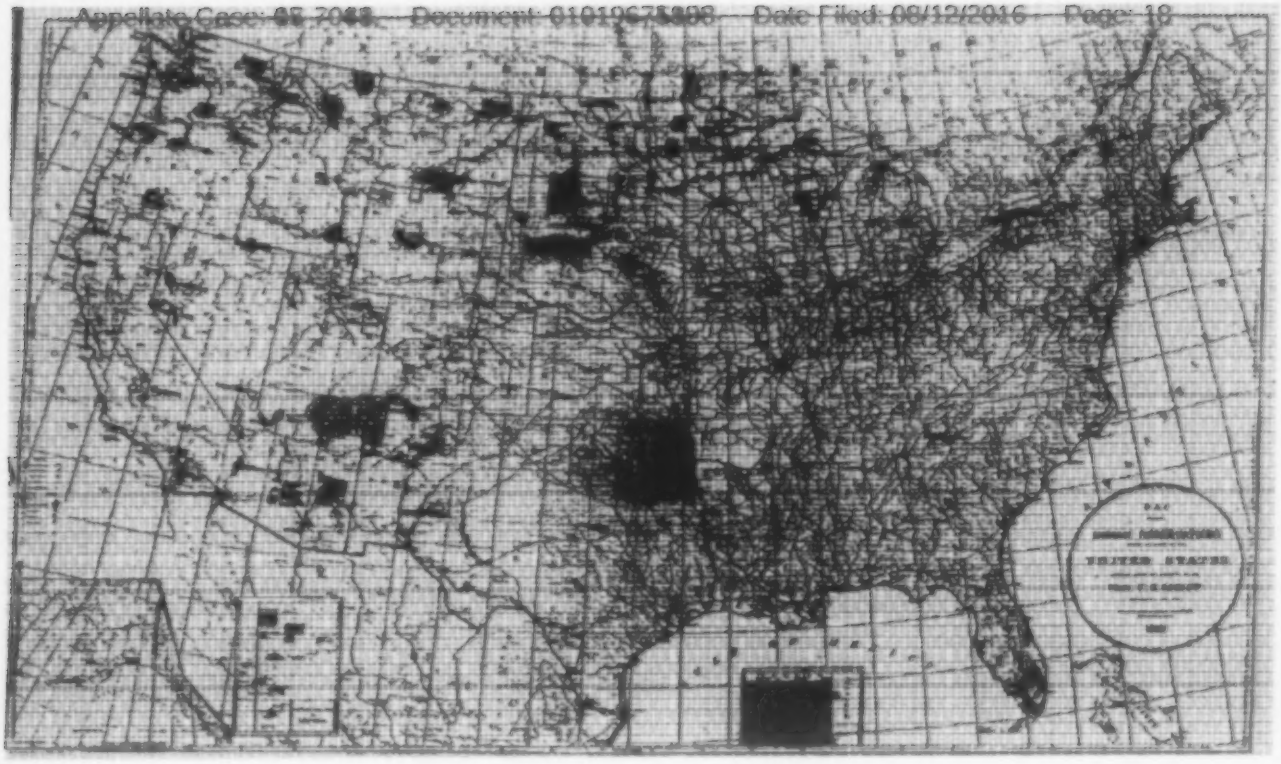
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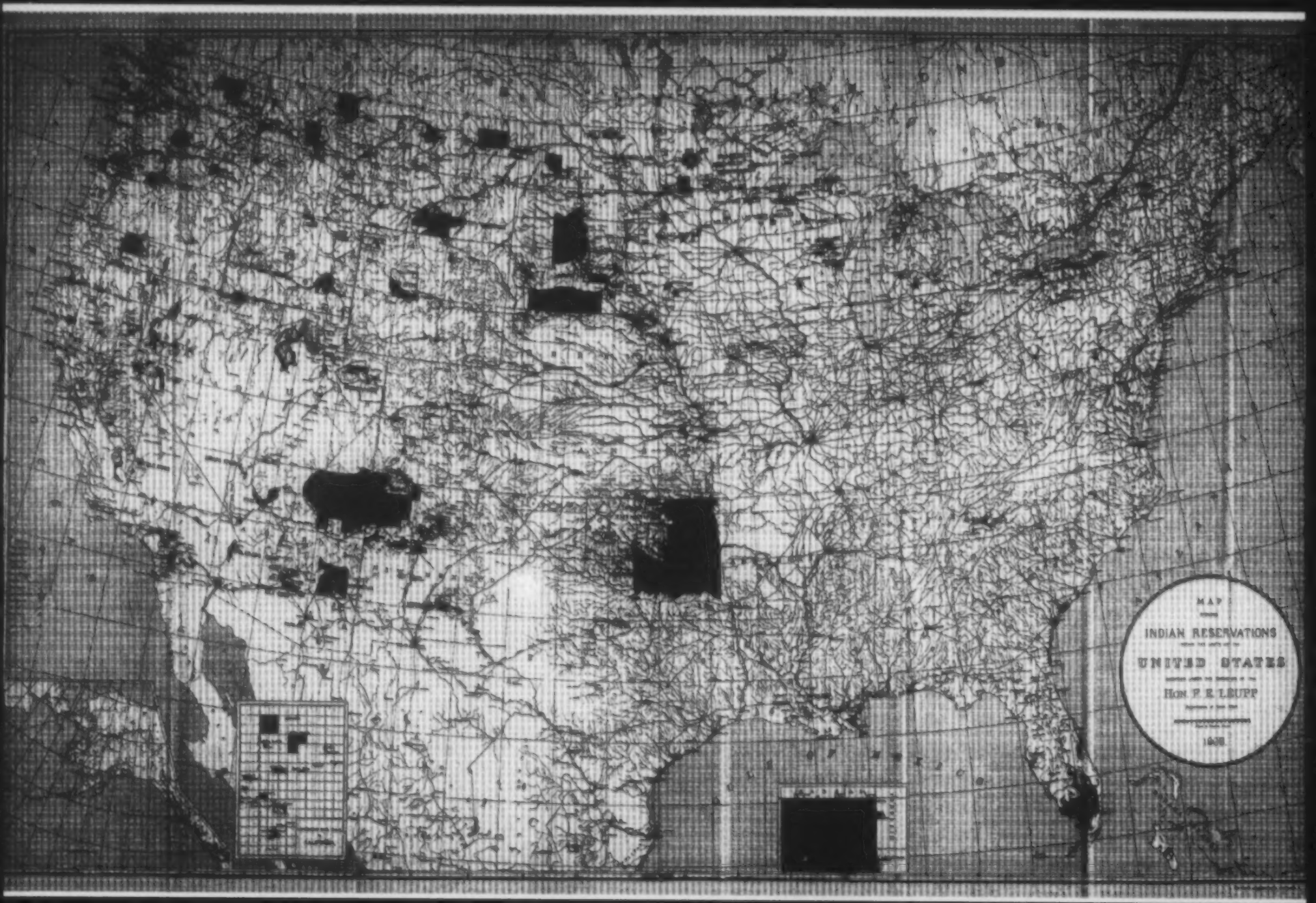
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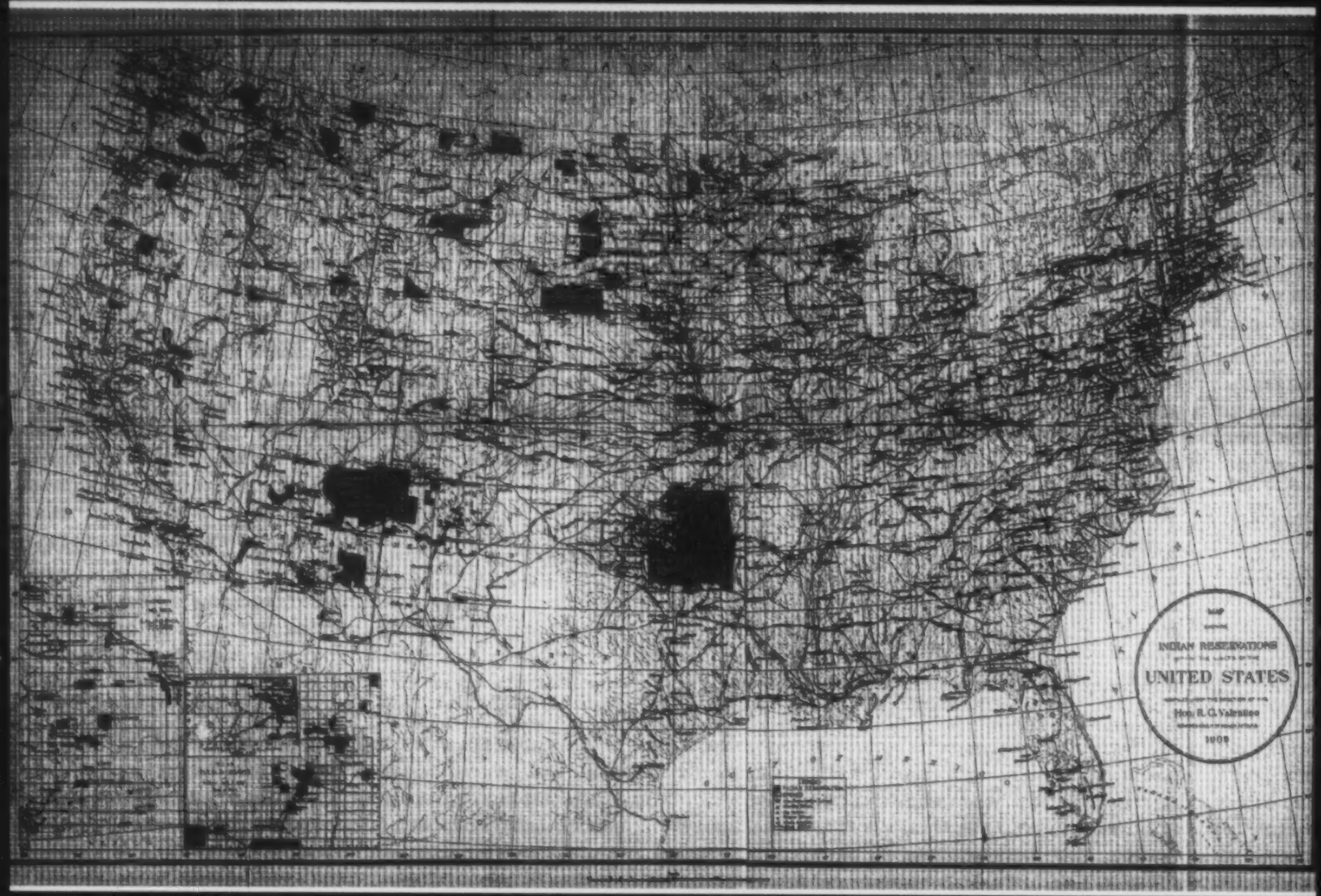
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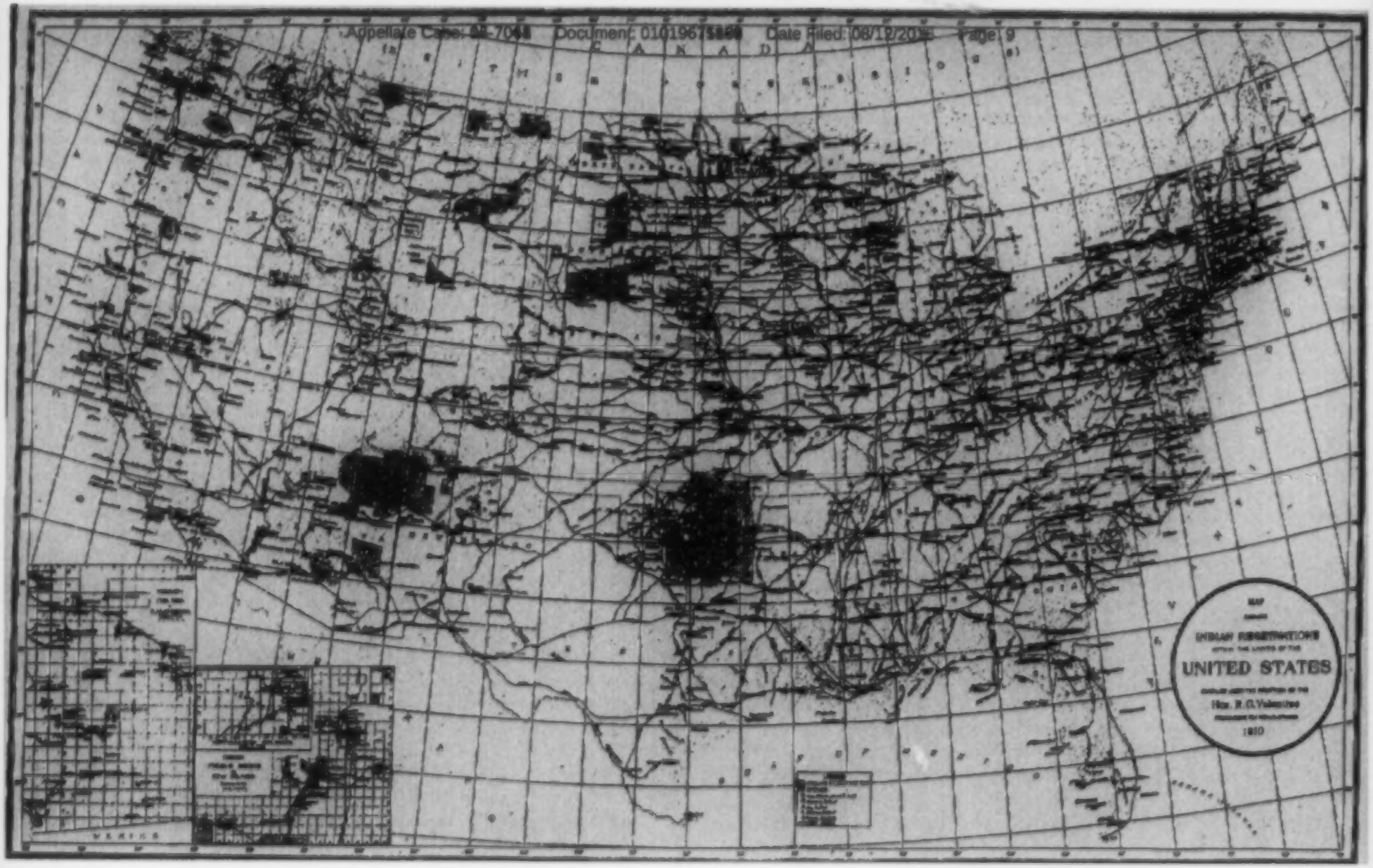
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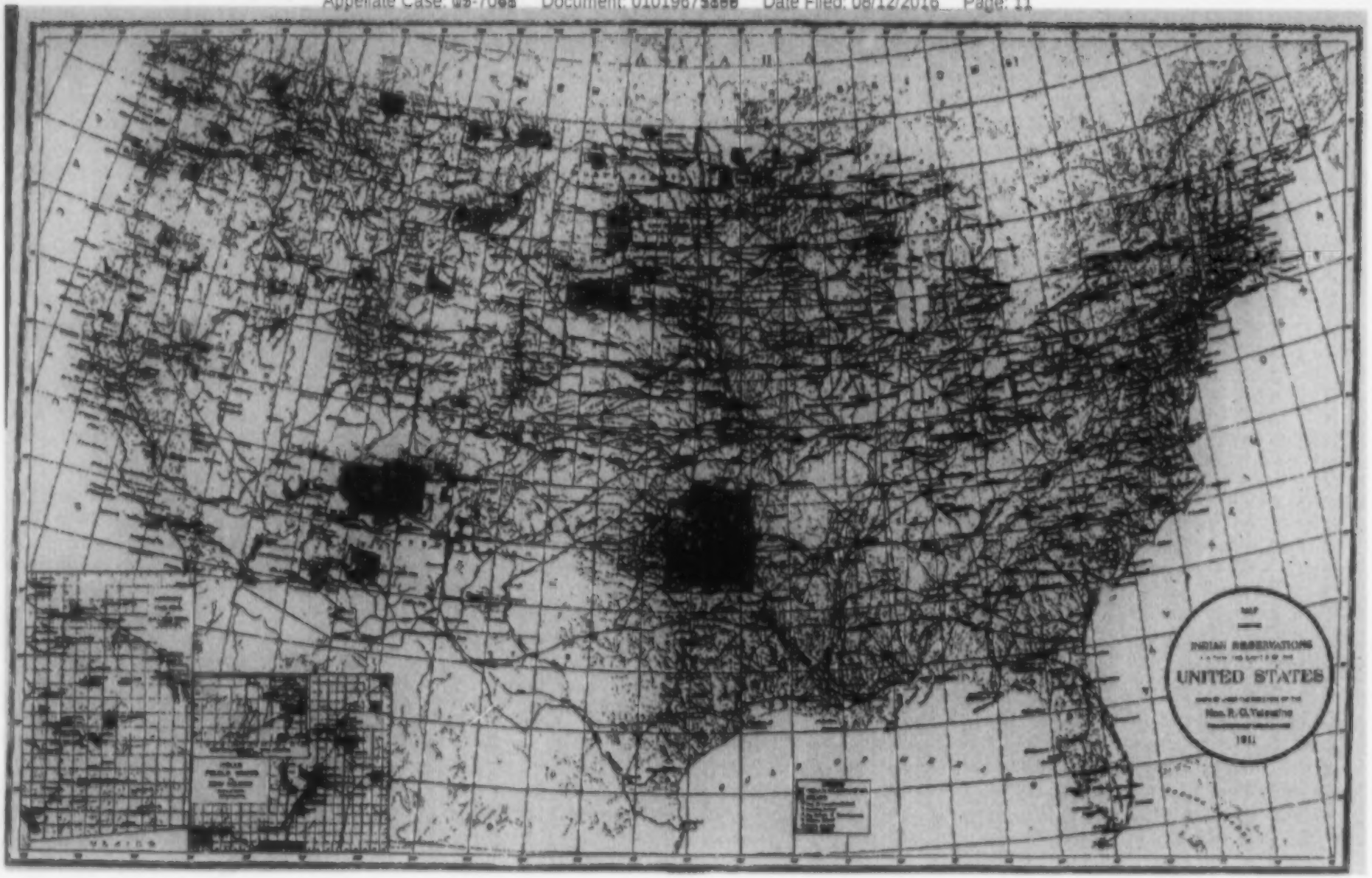
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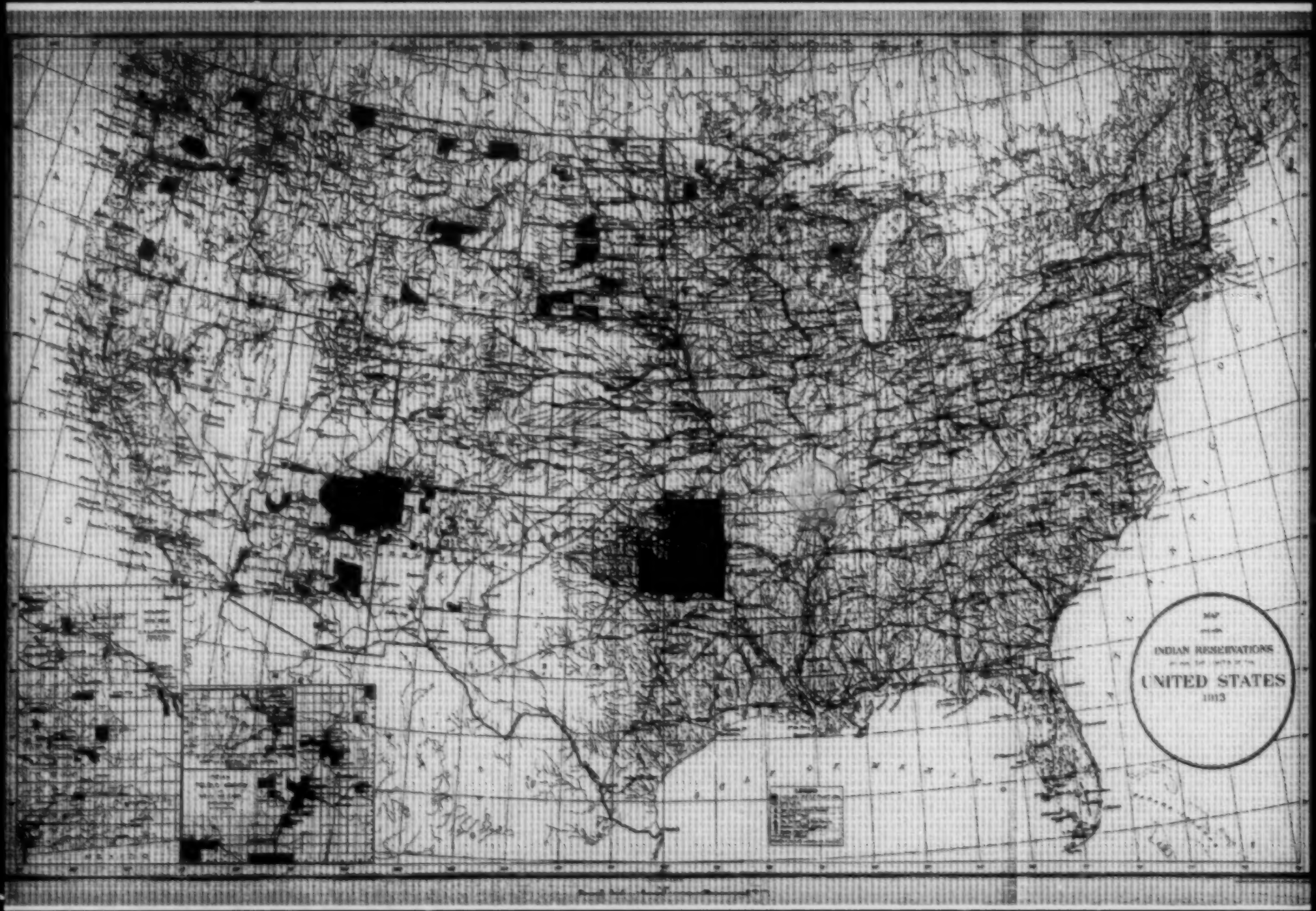
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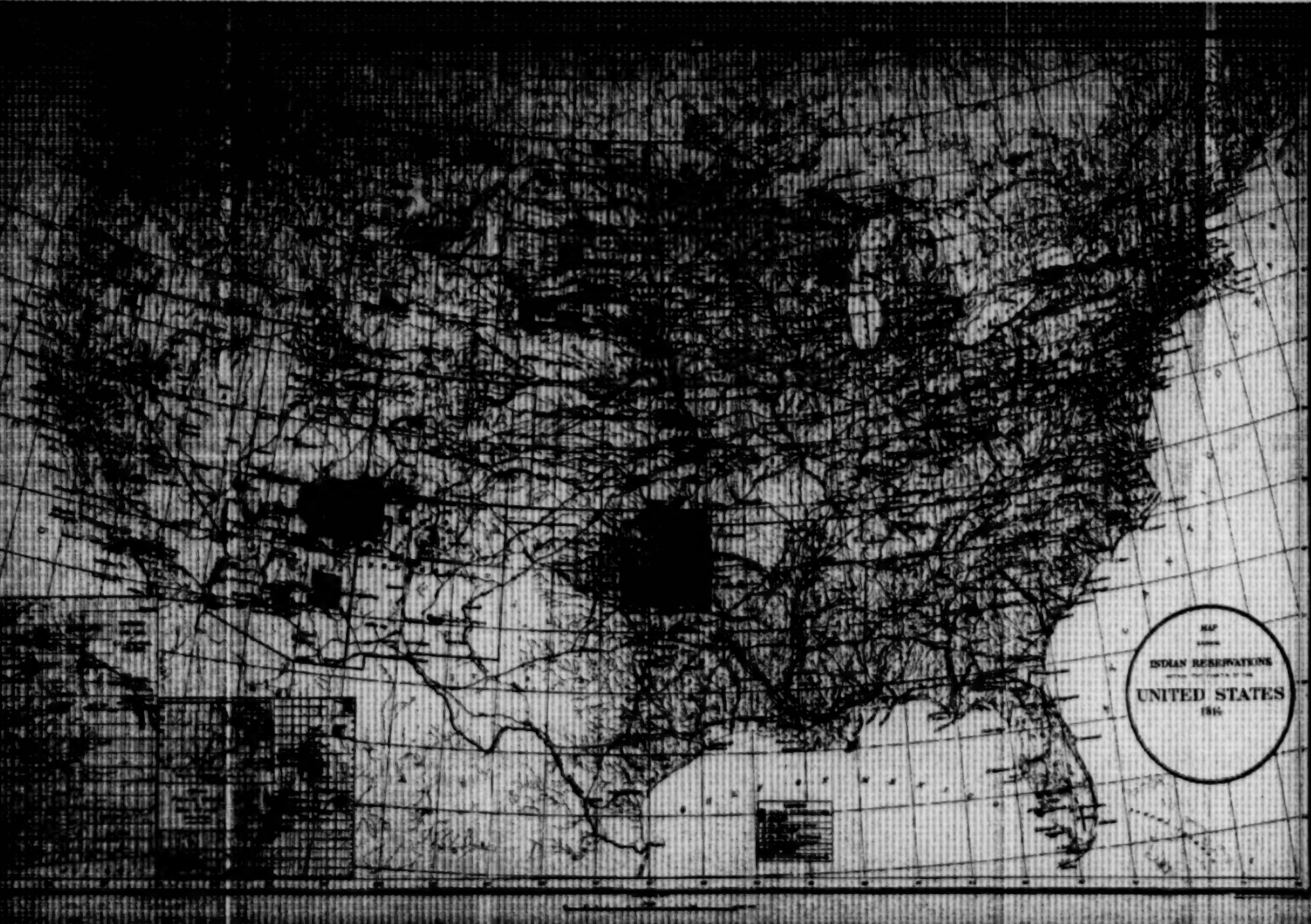
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No. 17-1107

IN THE

Supreme Court of the United States

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Petitioner,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

PARTIES TO THE PROCEEDING

Petitioner Mike Carpenter is the Interim Warden of the Oklahoma State Penitentiary. Petitioner was the respondent in the district court and the appellee in the Tenth Circuit.

Respondent Patrick Dwayne Murphy was the petitioner in the district court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 875 F.3d 896 (10th Cir. 2017). Pet. App. 1a. The district court's opinion is reported at *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). Pet. App. 134a. The opinion of the Oklahoma Court of Criminal Appeals is reported at *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005). Pet. App. 203a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on August 8, 2017. The court denied rehearing and issued an amended opinion on November 9, 2017. A timely petition was filed on February 6, 2018, and granted on May 21, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

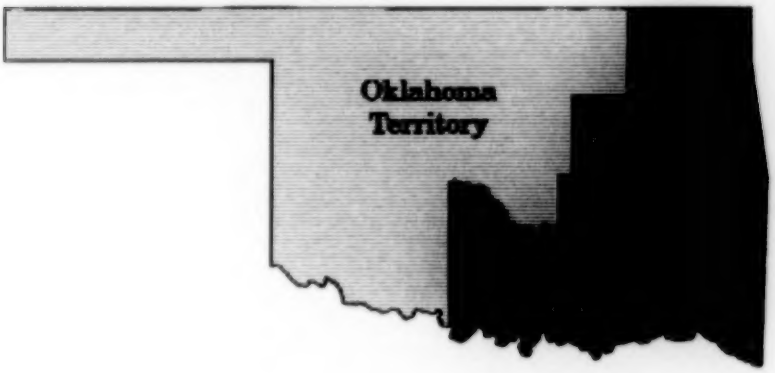
Section 1153(a) of Title 18, United States Code, provides, in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Section 1151 of Title 18, United States Code, provides, in relevant part: "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

STATEMENT

The question that precipitated this habeas case is whether respondent should have been tried in state court or federal court for the mutilation and murder of another man on a highway outside Henryetta, Oklahoma, in 1999. Respondent, an enrolled tribal member, contends that he committed his crime on an Indian reservation and therefore within "Indian country," 18 U.S.C. § 1151(a), and that the Major Crimes Act, 18 U.S.C. § 1153(a), precludes state criminal jurisdiction under those circumstances. The Tenth Circuit agreed, holding that over three million acres in eastern Oklahoma are currently an Indian reservation of the Muskogee (Creek) Nation. Because the Creek Nation's history parallels that of the Choctaw, Chickasaw, Seminole, and Cherokee Nations, the decision below likely renders more than 19 million acres in eastern Oklahoma "Indian country."

That cannot be right. Congress created the State of Oklahoma in 1907 by combining Oklahoma Territory from the west and Indian Territory from the east to form a unified State:



If affirmed, the decision below would reincarnate Indian Territory in the form of "Indian country" under 18 U.S.C. § 1151(a), cleaving the State in half. The decision below would create the largest Indian reservation in America today, which would include Tulsa—Oklahoma's second-largest city:

That revolutionary result would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes.

Affirmance would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil and overturn 111 years of Oklahoma history. Since statehood, not a single criminal case involving an Indian has been tried in federal court on the theory that the eastern half of Oklahoma is a reservation. Rather, upon Oklahoma's creation, Congress directed that the State, not the federal government, would try Indians for local crimes like murder. That's why, starting in 1907, the federal territorial courts immediately transferred all non-federal cases involving Indians to state courts.

Although affirmance would invite a tsunami of jurisdictional consequences, reversal requires this Court only to hold that the decision below misapplied *Solem v. Bartlett*, 465 U.S. 463 (1984), to require particular words to show disestablishment of tribal borders. *Solem* addresses laws that carve off "surplus land" from reservations within existing States, circumstances that bear no resemblance to the dismantlement of the Indian Territory to make way for the merger of two Territories to form a new State.

But even were *Solem* controlling, the result would be the same. All agree that this case boils down to congressional intent. Congress by treaty promised the Five Tribes communal land tenure and territorial sovereignty, which Congress subsequently disestablished in creating the State of Oklahoma. It is inconceivable that Congress would have bothered to create a State comprising both Oklahoma Territory and Indian Territory if the entire Indian Territory was to become reservation land over which the State had limited authority. Singularly fixated on whether Congress expressly eliminated borders and boundaries, the decision below missed the forest for the trees. The court never considered the legal status of the land within those borders and boundaries, *i.e.*, what kind of "reservation" the Creek Nation had, and what remained of that status by the time of statehood. By statehood, what remained of the Five Tribes' territories cannot remotely be called a "reservation" under any conceivable definition of that term.

A. The Formation of Oklahoma

1. The Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations form their own chapter in American history. "These tribes were collectively

known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 1 (1999).

In the 1830s, the United States forced the Five Tribes to abandon their homes in Georgia, Alabama, and Florida and migrate west to the designated "Indian Territory" in present-day Oklahoma. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (1972 ed.).[1] Congress established the Five Tribes' territories in a unique manner. Normally, the United States creates an Indian reservation by setting aside federal lands for the Indians to live under federal patronage. *See, e.g.*, Treaty with the Omahas art. 1, Mar. 16, 1854, 10 Stat. 1043; Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743. But Congress promised each of the Five Tribes, by treaty, communal patents for land to own in fee simple. Congress also promised that as long as the Five Tribes occupied their lands, they would be allowed to govern themselves; they would never be subject to the laws of any State or Territory; and their land would never be made part of any State.[2]

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[1] The Five Tribes occupied 99% of Indian Territory; a collection of tribes at the northeastern tip held the remaining 1%. Arrell Morgan Gibson, *Oklahoma: A History of Five Centuries* 149–50 (2d ed. 1981); Census Bureau, *United States: 2010—Summary Population and Housing Characteristics* 946, tbl.40 (Jan. 2013), goo.gl/jLLVod.

[2] Treaty with the Creeks art. XIV, Mar. 24, 1832, 7 Stat. 368; Convention with the Cherokees pmbl., May 6, 1828, 7 Stat. 311;

After the Creek Nation allied with the Confederacy during the Civil War, the United States forced the Creeks to cede the western half of their land. Treaty with the Creeks pmbl., art III, June 14, 1866, 14 Stat 785, 786 (1866 Treaty). The United States obtained similar cessions from the other four tribes. Parts of those lands were used for settlement of other tribes, but the rest—which became Oklahoma Territory—was eventually opened to non-Indian settlement beginning with the historic land run of 1889. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 6 (1940) (*Waters Run*). The remainder of the Five Tribes' land maintained its status as Indian Territory.

Congressional promises of perpetual independence and seclusion could not withstand the relentless tide of western settlement. Railroads, coal and cattle industries, and the settlement of the Western frontier facilitated migration of non-Indians onto tribal lands. *See Waters Run* 12, 15–18. Within two generations after their arrival west of the Mississippi, Indians were a slim majority of the population in Creek territory, and just 28% of the entire population of the territory of the Five Tribes. Census Office, *Extra Census Bulletin: The Five Civilized Tribes in Indian Territory* 4 (1894).

The tribal governments were ill-equipped to govern the rapidly increasing non-Indian population. Rampant disorder and lawlessness reigned. In the

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Convention with the Chickasaws art. II, May 24, 1834, 7 Stat. 450; Convention between the Choctaws and Chickasaws art. I, Jan. 17, 1837, 7 Stat. 605; Treaty with the Choctaws art. IV, Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks and Seminoles arts. I, IV, Aug. 7, 1856, 11 Stat. 699–700.

Creek Nation, Indians were subject to harsh laws and penalties under the tribal code, Gibson 137, but non-Indians lived beyond the reach of tribal courts. Federal district courts in neighboring Arkansas (and later in Kansas and Texas) had criminal jurisdiction over cases involving U.S. citizens arising in Indian Territory. *See* Jeffrey Burton, *Indian Territory and the United States, 1866–1906*, at 71 (1995). But given the distance, "only the most depraved—and least fortunate—of bandits were hauled before ... 'Hanging Judge' Isaac Parker." Danney Goble, *Progressive Oklahoma* 71 (1980). Violent crime went largely unpunished, and business agreements were effectively unenforceable. *Id.* Congress responded by creating federal territorial courts in Indian Territory and extending Arkansas law to govern non-Indians. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of Mar. 1, 1895, ch. 145, § 4, 28 Stat. 696.

Many within and outside Indian Territory also believed that communal land tenure and tribal sovereignty inhibited economic development. H. Craig Miner, *The Corporation and the Indian* 74–75 (1976). Non-Indians could not legally own land in the Territory because communal title was vested in the tribes, and even Indians enjoyed only rights of use or occupation. *Barnett v. Way*, 119 P. 418, 419 (Okla. 1911). Non-Indians—by now a large majority of the population of Indian Territory—were subject to tribal taxes but had no voice in the governments levying those taxes. *Waters Run* 18–19. Thus, the "Boomers" pressured the federal government to end tribal control "so that the land and resources could be developed and a new state created." Carter 36–38.

Proposals to convert Indian Territory into one or more States had been floated in Congress every year

since 1870. Carter 2. But because Congress had promised the Five Tribes communal land ownership and autonomous governments within their territorial boundaries, eradicating these foundations was a prerequisite for incorporating Indian Territory into a new State. Gibson 193–94; Luther B. Hill, *A History of the State of Oklahoma* 337–45 (1910). The "steady drift across the [Missouri] border for many years, and the presence among the Indians of hundreds of thousands of persons who were outlanders under their own flag finally made it necessary to abolish the tribal organization." Roy Gittinger, *The Formation of Oklahoma* 211 (1939); *see also Marlin v. Lewallen*, 276 U.S. 58, 61 (1928). "Congress finally assumed complete control over [the Creek Nation] and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal v. McKay*, 237 U.S. 372, 381 (1915).

2. Congress proceeded to dissolve the Five Tribes' communal land tenure and to end self-rule, aiming to "dismember[]" the "tribal government ... in stages." Burton 194. In 1893, Congress appointed a commission, led by Senator Henry Dawes, to "enter into negotiations with the [Five Tribes] for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes," whether by cession, allotment, or some other method, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645; *see also Jefferson v. Fink*, 247 U.S. 288, 291 (1918); *McDougal*, 237 U.S. at 380–81; *Woodward v. de Graffenried*, 238 U.S. 284, 295 (1915); *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899).

Congress established the Commission "in pursuance of a policy which looked to the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911); *Marlin*, 276 U.S. at 61 (same); Gittinger 236. As the Secretary of the Interior told the Commission, "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, ... the admission of another state or states in the Union." Carter 3 (quoting letter from Secretary Hoke Smith to Henry Dawes). The tribes understood that the Commission would "break up our tribal government and [would] end in the absor[p]tion of our people by the great body of the citizens in the United States." Chief Isparhecher, *The Creek Ultimatum of Isparhecher*, Indian Chieftain, Nov. 11, 1897 (quoting Creek council resolution), goo.gl/c2pzbo.

When negotiations failed because "the tribal governments refused to cooperate in their own demise," the Commission urged Congress to facilitate by legislation the completion of the Commission's work. Carter ix. In annual reports, the Commission painted Indian Territory as plagued by corruption, misrule, and crime. In 1895, the Commission wrote: "It is ... the imperative duty of Congress to assume at once the political control of the Indian Territory." S. Rep. 54-12, at 20 (1895). The Commission considered the Five Tribes' "so-called governments ... wholly corrupt, irresponsible, and unworthy to be longer trusted" to govern. *Id.* at 19; *see also Woodward*, 238 U.S. at 296–98; *Heckman v. United States*, 224 U.S. 413, 434–35 (1912).

Motivated by a desire to break up the tribes' communal land tenure and in response to the disorder it perceived in Indian Territory, *see Waters Run* 24–25, the Commission recommended the establishment of a territorial government and the extension of U.S. jurisdiction over all matters relating to the use and occupation of tribal lands. S. Rep. 54-12, at 20. Congress thereafter authorized the Commission to survey Indian Territory and enroll tribal members in preparation for allotment, with or without tribal consent. Act of June 10, 1896, ch. 398, § 1, 29 Stat. 339, 343. The federal government thus commandeered one of the most fundamental aspects of tribal sovereignty—the ability to control their own membership and to "define [their] own identity." Carter 52, 108.

Congress also extended the authority of the federal courts while steadily diminishing the tribal courts and tribal laws—a direct repudiation of the United States' treaty promises of tribal self-rule. Hill 318. In a concerted campaign to abolish race-based jurisdictional distinctions in Indian Territory, Congress in 1897 rendered tribal courts obsolete by conferring exclusive jurisdiction on federal courts to try all civil and criminal cases, and by subjecting all people in Indian Territory "irrespective of race" to Arkansas and federal law. Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83; *Marlin*, 276 U.S. at 61–62; *Washington v. Miller*, 235 U.S. 422, 424–25 (1914).

In 1898, Congress passed "An Act for the Protection of the People of Indian Territory, and for Other Purposes"—better known as the Curtis Act, ch. 517, 30 Stat. 495. But "[t]he innocuous-sounding 'other purposes' part was designed to complete the destruction of the tribal governments." Carter 34. Congress

abolished tribal courts and banned federal courts from enforcing tribal law. §§ 26, 28, 30 Stat. 504–05.[3] The Act also directed the Dawes Commission to allot the Five Tribes' land following tribal enrollment, even absent tribal consent. § 11, 30 Stat. 497. The Seminoles, Choctaws, and Chickasaws had already reached allotment agreements with the United States, and the Creeks and Cherokees quickly capitulated. The Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901), provided "for a permanent enrol[l]ment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation." *Sizemore v. Brady*, 235 U.S. 441, 447 (1914); *accord Marlin*, 276 U.S. at 63.

By authorizing allotment, Congress opened Indian Territory for eventual non-Indian ownership of land. The 1901 Creek Allotment Agreement provided that allotted lands would be alienable within five years, except 40 acres of homestead land for each allottee, which remained inalienable for 21 years. §§ 3, 7, 31 Stat. 862–63. Congress nonetheless relented to

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[3] The Atoka Agreement, ch. 517, 30 Stat. 505 (1897), contemplated the continuation of the Choctaw and Chickasaw courts in limited form. *See* § 29, 30 Stat. 511 (conferring exclusive federal jurisdiction over only certain controversies or offenses). But Congress further diminished those courts in 1904, Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (extending federal jurisdiction over probate matters), and definitively abolished them in 1907, Indian Department Appropriations Act of 1907, ch. 2285, 34 Stat. 1027.

pressure from the Boomers and Indians wishing to sell their land, and quickly lifted most restrictions on alienation. *See* Five Tribes Act, ch. 1876, § 22, 34 Stat. 145 (1906); Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. Within a decade, "the bulk of the landed wealth of the Indians passed into individual hands," and much of it was soon acquired by non-Indian settlers, by purchase, graft, or speculation. *Waters Run* 92–125.

The Five Tribes' governments were scheduled to terminate by March 4, 1906. Creek Allotment Agreement § 46, 31 Stat. 872; Curtis Act § 29, 30 Stat. 512 (Choctaw and Chickasaw); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 725 (Cherokee); Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 1008 (Seminole). Meanwhile, in 1901, Congress granted U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. Citizenship furthered "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population." H.R. Rep. 56-1188, at 1 (1900). By this time, tribal governments "were little more than consulting agents in the management of the business of the tribes." Gittinger 233. The Five Tribes "had ceased to exist except as financial corporations," *id.* at 234, whose assets were being liquidated and affairs wound up. And though some Indians resisted combining with Oklahoma Territory, "Congress ignored [their] protests ... and proceeded with a joint statehood project." *Waters Run* 160–62. In 1905, when the Five Tribes proposed a separate Indian state, to be called Sequoyah, Congress rebuffed the overture. Gibson 196.

With the March 4, 1906 termination date approaching, "there were a number of items of unfin-

ished business, such as signing deeds, that would require action by some official tribal entity." Carter 207. Congress also feared that ending tribal government before allotment was complete would trigger the transfer of land to railroad companies that held contingent land grants. *See, e.g.*, 40 Cong. Rec. 2976 (1906) (Sen. McCumber).

Congress was still debating proposed legislation to address these issues on February 26, just six days before the tribal governments were to terminate. Carter 208. On March 2, 1906, Congress temporarily extended the tribal governments, "until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." S.J. Res. 37, 59th Cong., 34 Stat. 822.

On April 26, 1906, Congress passed the Five Tribes Act, ch. 1876, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." In this "final winding up of tribal affairs," Angie Debo, *The Rise and Fall of the Choctaw Republic* 288 (1934) (*Rise and Fall*), Congress closed the tribal rolls, abolished tribal taxes, took control of tribal schools, and directed the Secretary of the Interior to seize and sell all tribal buildings and furniture. Congress directed the federal government to sell any unallotted lands, with the proceeds applied to tribal debts and any remainder paid out per capita to tribal members. Five Tribes Act §§ 16–17, 34 Stat. 143–44. Congress extended tribal governments, but with severe limitations on their operations and authority. § 28, 34 Stat. 148. In short, "[w]ith the passage of this act the tribal government in every real sense ceased to function." *Rise and Fall* 289.

3. Two months later, Congress enacted the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), authorizing the creation of the State through the merger of Indian and Oklahoma Territories. Congress directed the transfer of all cases arising under federal law, pending in territorial courts in the Indian and Oklahoma Territories at the time of statehood, to the newly created U.S. district courts for the Western and Eastern Districts of Oklahoma. § 16, 34 Stat. 276. *All* other cases were transferred to state court. § 20, 34 Stat. 277. Congress also extended the laws of Oklahoma Territory to Indian Territory (supplanting Arkansas law), until the new Oklahoma legislature provided otherwise. § 13, 34 Stat. 275.

The stage was thus set for Oklahoma statehood and for the fading of "a proud but vanishing tribal government, ... whose sun [was] now setting, and whose existence [was] now merging into that of general government." *To Save Indian Capitol*, Claremore Progress, July 21, 1906, at 2, goo.gl/aJBZgV. When President Roosevelt signed a proclamation admitting Oklahoma to the Union on November 16, 1907, Indians constituted just 9.1% of the population of the former Indian Territory. Census Bureau, *Population of Oklahoma and Indian Territory* 9 (1907). With Oklahoma's admission to statehood, the Five Tribes "may be said to have passed out of existence as ... separate political entit[ies]," and their history "fused with the greater history of the State of Oklahoma." *Rise and Fall* 290.

When news of Roosevelt's proclamation reached Guthrie, Oklahoma, at 9 AM on November 16, cheering crowds gathered outside the Carnegie Library to witness the union of Indian Territory and Oklahoma Territory in a symbolic wedding ceremony between

"Miss Indian Territory" (played by Anna Bennett, a Cherokee) and "Mr. Oklahoma Territory" (Charles "Gristmill" Jones of Oklahoma City). Hill 369–73. Oklahoma quickly "adopted the cultural heritage of the Indian" and "used it as the background of its own traditions," including by choosing a Choctaw word as the State's name and depicting on the State seal a frontiersman and Indian clasping hands inside a five-pointed star that contains the seals of each of the Five Tribes. *Waters Run* 291–93. In short order, a "large number of Indian citizens [were] elected to important positions in the new state," including the State's second governor and some of Oklahoma's most influential members of Congress. *Id.* at 171, 186, 315.

Statehood launched Oklahoma on the path to economic development. Today, eastern Oklahoma is home to more than 1.8 million people—48% of the State's population—roughly 9% of whom self-identify as Native American. More than half of these Oklahomans reside in and around Tulsa—long a major oil hub, now a vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors that drive the State's $186 billion economy. *See* Tulsa Regional Chamber, *2018 Tulsa Largest Employers*, goo.gl/Z6vKCo. From Oklahoma's entrance to the Union to the present day, neither the State, nor the federal government, nor the Five Tribes have treated the former Indian Territory as a reservation.

B. Case Background and Proceedings Below

1. On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs. Both men are members of the

Creek Nation. The crime began when Mr. Murphy used his vehicle to force Mr. Jacobs' car off the road late at night in a rural area of Henryetta, Oklahoma. Mr. Murphy and two accomplices pulled Mr. Jacobs out of the car and began to beat him. Over the course of five minutes, Mr. Murphy and his accomplices severed Mr. Jacobs' genitals with a folding knife and stuffed them into Mr. Jacobs' mouth, pulled Mr. Jacobs into a roadside ditch, slashed his throat and chest, and "tried to stomp on [his] head like a pancake." Pet. App. 140a. They left Mr. Jacobs to die beside the road. Mr. Murphy then instructed his accomplices to drive to a nearby home to kill Mr. Jacobs' son, George Jr. Someone in the house intervened, saving George Jr.'s life. Later that evening, Mr. Murphy confessed to both his girlfriend and his cousin. *Id.* Mr. Murphy was convicted in state court for first-degree murder and sentenced to death. Pet. App. 203a. His conviction and sentence were affirmed on appeal. *Id.*

2. In his second application for state post-conviction relief, in 2004, Mr. Murphy argued that Oklahoma courts lacked jurisdiction to convict him because he is an Indian and, he alleged, he committed his crime on an Indian reservation and thus could only be tried in federal court under the Major Crimes Act, 18 U.S.C. § 1153(a). The state court concluded that Oklahoma's jurisdiction was proper. The Oklahoma Court of Criminal Appeals agreed and denied post-conviction relief, finding no authority to support Mr. Murphy's theory that the 1866 bounda-

ries of the Creek territory remained intact as a "reservation." *See* Pet. App. 222a–24a.[4]

Mr. Murphy petitioned for a writ of certiorari on the question whether his crime was committed within Indian country. *Murphy v. Oklahoma* (No. 05-10787). In response to this Court's invitation, the United States filed a brief expressing the view that Congress has extinguished the historic boundaries of Creek Nation. U.S. Br. at 15–20, 2007 WL 1319320. This Court denied certiorari. 551 U.S. 1102 (2007).

3. On federal habeas review under 28 U.S.C. § 2254, Mr. Murphy asserted that the Oklahoma Court of Criminal Appeals had misapplied federal law on the question whether he committed the crime in Indian country. The district court held that the state court's decision rejecting Mr. Murphy's jurisdictional challenge was neither contrary to nor an unreasonable application of clearly established federal law and denied federal habeas relief. Pet. App. 184a–95a.

4. The Tenth Circuit reversed. The court held that federal law clearly established that Mr. Murphy's crime occurred in Indian country under 18 U.S.C. § 1151(a), because Congress never disestablished the 1866 boundaries of the Creek territory, which encompassed the land where the murder occurred. Pet. App. 132a–33a. The panel applied the three-part framework set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), which looks to statutory text,

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[4] The state courts also rejected Mr. Murphy's claim that the crime occurred in Indian country under §§ 1151(b) and (c), which pertain to "dependent Indian communities" and "Indian allotments." Pet. App. 215a–25a.

surrounding circumstances, and subsequent history. In an extended analysis of the main statutes at issue, Pet. App. 78a–102a, the court concluded that the State's argument failed at the first step because no text "expressly" disestablished or diminished the boundaries of the Creek Nation. Pet. App. 96a. The court further concluded that the contemporaneous and subsequent history did not "unequivocally reveal[]" congressional intent to erase the historical boundaries of the Creek territory. Pet. App. 107a, 119a (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)).[5]

The Tenth Circuit denied rehearing on November 9, 2017. Chief Judge Tymkovich concurred separately to urge review by this Court. Pet. App. 230a. He noted that this "case may present the high-water mark of *de facto* disestablishment" of Indian boundaries and that prior disestablishment cases may be "ill suited" to tackle the unique circumstances of "Oklahoma statehood." *Id.* at 232a. "[S]trictly applying *Solem*'s three-part framework in this context," Chief Judge Tymkovich wrote, "evokes 'the thud of square pegs being pounded into round holes.'" *Id.* at 230a.

SUMMARY OF ARGUMENT

The question presented is whether the land on which respondent murdered his victim in eastern Oklahoma falls within an "Indian reservation." The decision below held that it does—and thus vacated

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[5] In his appeal, Mr. Murphy also argued that the crime occurred on an Indian allotment. Because the Tenth Circuit held that the crime occurred on an Indian reservation, the panel did not address Mr. Murphy's allotment argument, Pet. App. 15a, which Mr. Murphy did not reassert as an alternative ground for affirmance when opposing certiorari.

respondent's capital murder conviction—because the panel erroneously believed that Congress never disestablished a Creek Nation reservation as defined by its 1866 borders.

I. The analysis must start with an understanding of what constituted the Creek Nation's "reservation" to determine whether it still exists today. Unlike other Indian tribes, for whom Congress set aside federal land in trust to establish a reservation, the Creek Nation and the other Five Tribes held title to their territory in fee simple pursuant to patents issued by the United States under treaties guaranteeing the tribes communal ownership, territorial sovereignty, and perpetual immunity from statehood.

None of these guarantees survived statehood. By 1907, Congress had explicitly broken up the Five Tribes' land patents by allotting the tribes' communal land to prepare the former Indian Territory for Oklahoma's admission to the Union. Simultaneously, Congress assumed "complete control" over the tribe's affairs and took dramatic steps to "terminat[e] their government." *McDougal*, 237 U.S. at 380–81. Congress stripped the Five Tribes of their most basic executive, legislative, and judicial functions to bestow those powers upon the new State. After the Five Tribes consented to their own demise by March 4, 1906, Congress continued the tribal governments beyond that date due to practical administrative concerns, but left the tribes with no territorial authority except "to sign deeds." S. Rep. 59-5013, pt. 1, at 885 (1907).

Congress's breach of its treaty promises of communal land ownership through fee patents and tribal self-government, combined with the creation of Oklahoma, amply overcomes the presumption that Con-

gress does not lightly abrogate its treaty promises or diminish a reservation. Members of Congress recognized that they had swept away "all the rights [the Five Tribes] have under the treaties which they have been given and guaranteed by the Government of the United States." 31 Cong. Rec. 5593 (1898) (Sen. Bate). By statehood, no law reserved land for any of the Five Tribes with boundaries coextensive with the 1866 borders.

Congress's disestablishment of the Five Tribes' territorial borders comports with the principle that a reservation is defined by a tribe's sovereignty within a specific geographic area. Thus, allotment can coexist with reservation status when a tribe's sovereignty still extends to specified borders. Here, however, Congress expressly abrogated any semblance of self-rule and submitted the Five Tribes to state law, thereby stripping the tribes of jurisdictional sovereignty over the land. Without land or territorial sovereignty, tribal borders after statehood had meaning only as historical references.

II. Congress expressly withdrew the aspect of reservation status at issue here—federal criminal jurisdiction—and bestowed upon the State responsibility for prosecuting local crimes involving Indians. If eastern Oklahoma had constituted a reservation after statehood, the transfer of scores of cases from federal to state courts immediately upon statehood would have violated the Major Crimes Act. And the federal government has never asserted criminal jurisdiction on the theory that eastern Oklahoma is an Indian reservation. "This 'jurisdictional history' ... demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen v. Utah*, 510 U.S. 399, 421 (1994). A contrary conclusion would

have created an implausible jurisdictional gap wherein *no* court would have had power to prosecute numerous crimes within the former Indian Territory.

III. The framework of *Solem v. Bartlett*, 465 U.S. 463 (1984)—which focuses on indicia of disestablishment in specific terms used in surplus land acts—is not designed for the unique circumstances of Oklahoma and the Five Tribes. *Solem* examines whether Congress has diminished the boundaries of a traditional Indian reservation by carving off "surplus land" for settlement by non-Indians. But Congress never established this kind of reservation for the Five Tribes, and this case does not involve a "surplus land" act. The court below erred in parsing statute after statute in search of specific language, traditionally found in surplus land acts, that expressly "terminated" or "erase[d]" the Creek Nation's borders. Pet. App. 81a, 93a, 95a–97a, 104a.

Had the decision below examined whether Congress disestablished—that is, rescinded—the type of "Indian country" Congress created in the former Indian Territory for the Five Tribes, the answer would have been plain. Congress expressly repudiated every promise that could have made the area a reservation. Moreover, the contemporaneous historical context is unequivocal that Congress intended to disestablish the Creek borders as a necessary step on the path to Oklahoma statehood. And the post-statehood history and demographics of the region confirm disestablishment. Thus, even under *Solem*, by the time of statehood the Creek Nation had no "reservation" under any conceivable conception of that term.

ARGUMENT:
EASTERN OKLAHOMA IS NOT A RESERVATION

In holding that the State failed to overcome the presumption that the former Creek territory holds reservation status today, the court below started with the wrong baseline understanding of what kind of territory Congress created for the Creek Nation in the first place, and thus what kind of domain the State had to show was disestablished. Congress by treaty promised the Creek Nation and the other Five Tribes patents granting communal ownership of the lands at issue and permanent territorial sovereignty, forever insulated from statehood.

Congress expressly and unequivocally broke each of these promises. After allotment, no operative law existed that reserved land for any of the Five Tribes coextensive with their original borders. And in act after act, Congress expressly dismantled tribal government, leaving the Five Tribes with no courts, no tribal law, no power of self-governance, no schools, no buildings, and no jurisdictional authority over non-Indians on the land. Congress expressly provided that Oklahoma, rather than the federal government, had jurisdiction to prosecute murderers like respondent. In short, by statehood, all that remained within the former Indian Territory were shells of tribal presence without land or territorial sovereignty, with tribal members subject to state prosecution for local crimes.

Although congressional intent is clear, that intent becomes pellucid in light of the equal footing doctrine enshrined in the Enabling Act. § 4, 34 Stat. 271; *Coyle v. Smith*, 221 U.S. 559, 567, 580 (1911). It is inconceivable that Congress created a new State by combining two territories while simultaneously

dividing the jurisdiction of that new State straight down the middle by leaving the former Indian Territory as Indian country. The State would not have had "all the rights of sovereignty, jurisdiction, and eminent domain" over its eastern half comparable to the original 13 states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). This Court should not assume Congress did so much to accomplish so little.

I. Congress's allotment of tribal land and dismantlement of territorial sovereignty to create Oklahoma is incompatible with reservation status.

Determining whether borders have been disestablished depends on what Congress established within those borders to begin with. The Creek Nation's 1866 geographic borders were defined by land patents in fee simple under treaties promising perpetual communal ownership, self-governance, and seclusion, *i.e.*, insulation from statehood. Congress clearly disestablished those borders, along with the borders of the other Five Tribes, by allotting tribal land and stripping the tribes of territorial sovereignty to prepare the region for statehood.

A. Congress did not establish traditional reservations for the Five Tribes.

Each of this Court's disestablishment cases presupposes federal law that defines the tribe's boundaries as a tract of federal land set apart as a "reservation."[6] In a traditional reservation, "the federal gov-

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[6] Act of Mar. 2, 1889, ch. 405, §§ 2, 4, 25 Stat. 888–89 ("the following tract of land ... is hereby set apart for a permanent reservation") (*Rosebud*; *Solem*); Executive Order (July 2, 1872), *re-*

ernment holds title to the land in trust on behalf of the tribe." Dep't of Interior, Bureau of Indian Affairs, *Frequently Asked Questions: What Is a Federal Indian Reservation?*, goo.gl/gjw2Xc; *Spalding v. Chandler*, 160 U.S. 394, 402–03 (1896); Felix S. Cohen, *Handbook of Federal Indian Law* § 3.04, at 190–91 (2012 ed.). These lands retain reservation status "until Congress explicitly indicates otherwise" through express abrogation or modification of the underlying document that set aside the reservation for Indian use. *Solem*, 465 U.S. at 470; *United States v. Celestine*, 215 U.S. 278, 285 (1909).

The starting point is fundamentally different for the Creeks and the other Five Tribes. The Creeks "[were] not on the ordinary Indian reservation, but on lands patented to them by the United States." Dep't of Interior, Bureau of Indian Affairs, *Report on Indians Taxed and Indians Not Taxed in the United States* 283–84 (1894); *United States v. Creek Nation*, 295 U.S. 103, 109 (1935). Congress never set aside federal lands to hold in trust as a permanent home for the Creeks. Instead, Congress "solemnly guarantied" a "Creek country west of the Mississippi" by

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printed in 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* 917 (1904) (area "set apart as a reservation") (*Seymour*); Treaty with the Sioux–Sisseton and Wahpeton Bands art. III, Feb. 19, 1867, 15 Stat. 506 ("set[ting] apart ... the following-described lands as a permanent reservation") (*DeCoteau*); Act of May 5, 1864, ch. 77, § 1, 13 Stat. 63 ("the several Indian reservations heretofore made") (*Hagen*); Treaty with the Yankton Sioux arts. I, III, Apr. 19, 1858, 11 Stat. 744 (describing boundaries of "said reservation") (*Yankton*); Executive Order (Nov. 16, 1855), *reprinted in* 1 Kappler 817 (authorizing "the reservation be made as proposed") (*Mattz*); Treaty with the Omahas art. 1, Mar. 16, 1854, 10 Stat. 1043 (describing "the country hereby reserved") (*Parker*).

promising an area delineated by "a patent, in fee simple, to the Creek nation of Indians," within which the Creeks enjoyed the right to self-government and territorial sovereignty. Treaty with the Creeks art. XIV, Mar. 24, 1832, 7 Stat. 368 (1832 Treaty); Treaty with the Creeks art. III, Feb. 14, 1833, 7 Stat. 419. After Congress issued the patent on August 11, 1852, "the title to these lands" was "held by the tribe in trust for the people." *Woodward*, 238 U.S. at 293, 299 n.25. This land became known as "Creek country." Treaty with the Creeks and Seminoles art. II, Aug. 7, 1856, 11 Stat. 700; *cf.* arts. V, VI, 11 Stat. 701 (referring to different Indian lands outside Indian Territory as "reservations").[7]

No other statute or treaty establishes a Creek "reservation." Thus, determining whether Creek borders—*i.e.*, their sovereign territory—still exist turns on Congress's subsequent treatment of the land patent that established tribal borders and Congress's action with respect to its treaty promises of tribal territorial sovereignty. The court below eschewed this approach. Parsing each statute seriatim and in isolation, and mentioning "borders" or "boundaries" 43 times (Pet. App. 74a–107a), the court asked whether they were eradicated without regard to whether anything resembling a "reservation" remained after statehood. The answer was no.

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[7] Because Congress took a similar approach with the other Five Tribes, *supra* note 2, the Choctaw Principal Chief later declared, "The Indians of the Five Tribes have never been reservation Indians." *Statehood for Indian Territory and Oklahoma: Remarks of Robert L. Owen Before the H. Comm. on the Territories*, 58th Cong. 131 (1904) (*Statehood Remarks*) (reproducing letter from Green McCurtain).

B. Congress broke up the land patents that established tribal borders.

The influx of white settlement and a desire for economic development created overwhelming pressure to transform Indian Territory, and thus the great estates of the Five Tribes, into one or more States. *Supra* pp. 6–8. But the tribes' communal land tenure was fundamentally incompatible with the creation of a State encompassing the same land. So long as tribal ownership continued, non-Indians had no legal right to permanently own and develop the land. And because the tribes "held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership." *Woodward*, 238 U.S. at 294. A mountain of historical scholarship confirms that Congress viewed dissolving tribal land ownership as necessary to achieve statehood. Gibson 193–94; *see also* Gittinger 211–13, 236; Hill 337–45; Carter 36; *Waters Run* 159–80.

The unprecedented work of the Dawes Commission proceeded with the singular purpose of breaking apart the Five Tribes to form one or more States. Congress created the Commission in 1893 to negotiate with the Five Tribes "for the purpose of the extinguishment of ... tribal title[,] ... either by cession ... to the United States, or by ... allotment and division ... in severalty among the Indians[,] ... or by such other method as may be agreed upon between the several ... tribes [and] the United States, with a view to the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory." Act of Mar. 3, 1893, § 16, 27 Stat. 645. Congress's objective was clear: whether by ces-

sion or allotment, Congress intended to terminate the sovereign territories of the Five Tribes.

When negotiations failed, Congress forced allotment on the tribes to extinguish their territory. Congress understood that "if the Indians ... decline to consider any change in the present condition of their titles and government, the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that territory." *Woodward*, 238 U.S. at 299–300 n.2 (quoting S. Rep. 53-377 (1894)). Thus, Congress "[b]y acts passed in 1890, 1893, 1897 and 1898 ... manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a state embracing the Indian Territory." *Jefferson v. Fink*, 247 U.S. 288, 291 (1918); Carter ix. The historic allotment process that followed was a laborious undertaking that diminished, parcel by parcel, the land patents held by the tribes. *See generally* Carter 125–53; *Waters Run* 31–60.

Ultimately, the Oklahoma Enabling Act unmistakably broke the treaty promise that Creek land would never be made part of any State. 1832 Treaty art. XIV, 7 Stat. 368; *see, e.g.*, 40 Cong. Rec. at 1514–15 (Rep. Beall); *id.* at 8399 (Sen. Morgan). Congress did not need to pass a separate statute expressly declaring borders disestablished. Tribal boundaries necessarily evaporated when Congress dissolved communal tribal land tenure, abrogated its treaty promises, and merged Indian Territory into the new State of Oklahoma. Once Congress allotted the land as a prelude to statehood, the geographic borders of the Five Tribes' communal territories disappeared

along with the land patents establishing them. As one local reporter wrote following the "last meeting of the Creek Council" on October 11, 1907, "[t]he coming of statehood will obliterate all lines of the once powerful Indian nations." *Last Meeting of Creek Council*, Bixby Bulletin, vol. 3, no. 34, Oct. 11, 1907.

C. Congress rescinded the Five Tribes' territorial sovereignty.

While allotment and statehood extinguished the *physical* borders of the Five Tribes' territories, Congress wiped away all *jurisdictional* borders by systematically dismantling the tribes' territorial sovereignty, leaving no vestige or other indicia of a reservation.

1. By the end of 1907, the Creek Nation had no independence, solitude, or territorial sovereignty. Congress assumed "complete control" over the Creek Nation and took dramatic steps to "terminat[e] their government" to make way for statehood. *McDougal*, 237 U.S. at 381; *Tiger*, 221 U.S. at 300; *Marlin*, 276 U.S. at 61–62. Congress stripped the Five Tribes of the most basic executive, legislative, and judicial functions to bestow those powers upon the new State. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976) (describing Congress's "statutory dismemberment" of the Creek Nation).

The Creek Nation and the other Five Tribes agreed that their governments would terminate by March 4, 1906. *Supra* p. 12. Meanwhile, Congress took sweeping measures to obliterate the Five Tribes' self-government. Congress authorized the President to remove the Five Tribes' principal chiefs and appoint their successors, prohibited tribal governments from congregating more than 30 days per year, and

barred them from enacting legislation or entering into contracts involving their funds or land without presidential approval. Five Tribes Act §§ 6, 28, 34 Stat. 137, 139, 148. Congress directed the Secretary of the Interior to assume control of tribal schools, abolished tribal taxes, and took possession of tribal buildings and sold off all the tribes' property. §§ 10, 11, 15, 34 Stat. 140–41, 143. And the Dawes Commission usurped one of the most foundational attributes of tribal sovereignty—the ability to determine tribal membership. *Supra* p. 10; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008).

Congress also "abolished all tribal courts in the Indian Territory and provided that 'the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.'" *Miller*, 235 U.S. at 425 (citation omitted); *see also Jefferson*, 247 U.S. at 291. Congress thus "broke the back of tribal government for, without an independent judiciary, the tribes were powerless to delay or seriously influence the course of whatever was ordained by Congress and the Executive of the United States. ... Once the courts had been eliminated[,] ... none of the Five Tribes held a title stronger than an eight-year lease on a local suboffice of the federal government." Burton 237–38.

In abolishing the Creek judiciary, Congress breached its promise that the tribe would never be subject to the laws of any state or territorial government, but would be "allowed to govern themselves." 1832 Treaty art. XIV, 7 Stat. 368; *see also* 1866 Treaty art. III, 14 Stat. 786–87. This abrogation of self-government was widely acknowledged over many

years in Congress. 29 Cong. Rec. 2305 (1897) (Sen. Vest); *id.* at 2310 (Sen. Bate); *id.* at 2341 (Sen. Vilas); 30 Cong. Rec. 735 (1897) (Sen. Pettigrew); 31 Cong. Rec. at 5593 (Sen. Bate); *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 48–49 (1904) (*Statehood Hearing*) (Mr. Doyle); *id.* at 98 (Mr. Howe).

The Creeks understood the implications of the abolition of their courts. Chief Pleasant Porter, addressing the Creek legislature in 1901, reported that Congress had "pos[i]tively" rebuffed the Creeks' attempts to negotiate for the restoration of "some limited measure of government" to the tribal courts. *Message of Pleasant Porter to Members of the House of Kings and Warriors in Council Assembled* (Okla. Hist. Society Catalogue No. 35,667). Chief Porter explained that "[i]t would be difficult, if not impossible, to successfully operate the Creek government now ... and the remnant of government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled." *Id.*

So complete was the dismantling of tribal government that, in 1901, Congress issued a blanket grant of U.S. citizenship to "every Indian in Indian Territory." Act of Mar. 3, 1901, 31 Stat. 1447. Citizenship here differed from the treatment of other tribes, for whom Congress tied the grant of citizenship to a tribal member's receipt of an allotment. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 390. With the Five Tribes, Congress conferred citizenship on all members when allotment had barely begun. The Five Tribes had previously resisted U.S. citizenship "on the ground that they were conducting

governments of their own, which would be weakened by such a step." H.R. Rep. 56-1188, at 1. But Congress recognized that the "independent self-government of the Five Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out." *Id.*; *see also* Gittinger 234.

The Five Tribes viewed Congress's grant of citizenship as yet another marker of the end of their separate sovereignty. Congress "look[ed] to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States." *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591 (1916). As Chief Porter remarked in a 1901 address to the Creek council, the blanket grant of citizenship rendered the Creeks "amenable to [federal] laws and clothed with all the rights of other citizens of the United States. ... It will be seen from this that the restitution of the tribal government is now rendered a matter of impossibility." *Message of Pleasant Porter to Members of the House of Kings and Warriors in Council Assembled* (Okla. Hist. Society Catalogue No. 35,667); *accord Interview with Pleasant Porter*, Muskogee Phoenix, Jan. 17, 1901.

2. The conclusion that no reservations existed after statehood is further compelled by the meaning of reservation status under Indian law. An essential marker of reservations is the right of "reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). A reservation requires that a tribe have the "ability to

exercise ... sovereign functions" within a defined area of land. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982). If a tribe has no power to wield over a parcel of land, it lacks *territorial* sovereignty over that land. Borders are relevant only to delineate the tribe's jurisdiction over a defined area. Cohen § 4.01[2][f]. That is, territory is derivative of and defined by the exercise of tribal power. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing "the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

Accordingly, congressional intent with regard to the exercise of governmental authority over activities within a particular area has always been critical in determining whether land is part of a reservation. *Rosebud*, 430 U.S. at 598 n.20. In *Solem*, for example, this Court found significant that a surplus land act did not speak to the issue of "jurisdiction over the opened areas." 465 U.S. at 478. The decision below thus erred gravely in declaring, time and again, that tribal "governance" has no bearing on reservation status. Pet. App. 105a–07a; *see also* 78a, 81a, 82a, 96a, 111a, 113a. The two concepts are inextricable; it is inconceivable that Congress would have intended the latter to continue without the former. Borders cannot exist untethered to any sovereign purpose that makes borders relevant. Because the State has more than overcome any presumption that Congress preserved the Creek land patents and territorial sovereignty, it is incumbent on respondent to specify in what meaningful sense the Creek Nation's historical territory could be considered a "reservation" after statehood.

D. Nothing cited by the court of appeals and respondent is to the contrary.

The arguments marshalled below do not reflect any sovereign characteristic of a reservation.

1. The court below noted that Article IX of the 1866 Treaty once refers to the Creek territory as a "reduced ... reservation." Pet. App. 65a. That reference does not set aside federally owned land to be held in trust for the tribe. The reference appears in a provision guaranteeing that the United States would rebuild agency buildings destroyed during the Civil War on the "reduced ... reservation." 1866 Treaty art. IX, 14 Stat. 788. Yet when the same treaty delineates the 1866 Creek boundaries, it refers to the territory as "Creek lands," not a reservation. *Id.* art. III, 14 Stat. 786. In any event, reference to the word "reservation" in the 1866 treaty is meaningless when all vestiges of reservation status were destroyed upon statehood.

Respondent also relies on assorted statutory references to the "Creek Nation" leading up to statehood to conclude that the 1866 tribal borders persisted. Opp. 8; *see also* Pet. App. 88a, 102a. But each reference relates to the *then-extant* Creek Nation.[8] Congress naturally referred to that territory in the multi-year process of extinguishing it. And any references to the "Creek Nation" after statehood (Pet. App. 121a) used the term as a historic signifier, not in recognition of contemporary reservation status.

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[8] Creek Allotment Agreement §§ 10, 25, 37, 41–43, 31 Stat. 864, 869, 871–72; *see also* Supplemental Allotment Agreement, ch. 1323, §§ 11, 13, 17–18, 32 Stat. 502–04 (1902); Five Tribes Act §§ 12, 14, 16, 24, 28, 34 Stat. 141–43, 146, 148; Oklahoma Enabling Act § 6, 34 Stat. 272.

See United States v. Okla. Gas & Elec. Co., 318 U.S. 206, 216–17 (1943) ("term 'Kickapoo Reservation'" was not used in "a legal sense" but rather as a historical delineation, "much as one still speaks of the Northwest Territory").

Nor did Congress create or recognize a reservation in June 1906 by referring to the "west boundary line" and "the north line of the Creek Nation." Pet. App. 101a (citing Act of June 21, 1906, ch. 3504, 34 Stat. 364). Congress in the June 1906 act resolved a boundary issue that had complicated allotment along the Creek territory's western edge. *See Creek Nation*, 295 U.S. at 106–10; Mary Jane Warde, *George Washington Grayson and the Creek Nation, 1843–1920*, at 123, 243–44 (1999). And tribal boundaries remained relevant for purposes of allotment, a process that continued post-statehood. Carter 151. Thus, while some maps labeled the Indian Territory as reservations until 1914, Pet. App. 123a; J.A. Vol. II, the Department of the Interior clarified its geological surveys by 1919 to show that the former Indian Territory had *no* reservations. Records of the Bureau of Indian Affairs, Central Map File, Record Grp. 75.26, Entry 414 (Administrative Maps), *Indian Reservations West of the Mississippi River* (1919), goo.gl/1v64Ec. That position has not wavered since. *E.g.*, *id.*, *Indian Reservations West of the Mississippi River* (1923), goo.gl/Ak1d3U; Bureau of Indian Affairs, *Indian Lands of the Federally Recognized Tribes of the United States* (2016), goo.gl/gvbGYY.

2. Respondent attempts to show reservation boundaries from vestigial functions of tribal government. Opp. 9. For example, he mentions that the Creek Allotment Agreement "reserved lands" for unidentified "tribal purposes." Pet. App. 102a (citing

§ 24, 31 Stat. 868–89). The only apparent tribal purposes in the cited provision are tribal schools and "six established Creek courthouses." These *de minimis* individual parcels do not justify cloaking half of Oklahoma in reservation status. Regardless, the Five Tribes Act transferred control of tribal schools to the federal government until they could be replaced with state schools. § 10, 34 Stat. 140. And because the Curtis Act had already abolished the Creek courts, those lands—having no further tribal purpose—were opened for sale. § 24, 31 Stat. 869.

The panel also observed (Pet. App. 70a, 117a–18a) that *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), held that the Creek Nation continued to have taxing authority within its 1866 borders, even after the Creek Allotment Agreement. *Buster* reasoned that extinguishment of title does not necessarily extinguish sovereign powers. *Id.* at 951–52. But immediately following this decision, the Five Tribes Act abolished this taxing authority and required the refund of any taxes levied after December 31, 1905. *See* § 11, 34 Stat. 141. Here too, Congress rendered tribal borders meaningless as markers of jurisdictional authority.

The court below also relied (Pet. App. 90a–93a, 106a–07a) on Congress's indefinite extension of the Five Tribes' governments beyond the original March 4, 1906 termination date. S.J. Res. 37, 59th Cong., 34 Stat. 822; Five Tribes Act § 28, 34 Stat. 148. But Congress merely continued the governments' formal existence; Congress did not restore a single power it had stripped away. Indeed, Congress spelled out its intent in the Five Tribes Act's title: "An Act To provide for the *final disposition* of the affairs of the Five

Civilized Tribes in the Indian Territory." 34 Stat. 137 (emphasis added).

This Court has never required a complete extinction of tribal government to find reservation disestablishment, and Congress's campaign to dissolve the Five Tribes' governments was unprecedented. While it is true that the Creek Nation persisted as a *political* body in skeletal form, Congress's actions "culminat[ed] in the abolition of the tribe's *territorial* sovereignty." *Harjo*, 420 F. Supp. at 1143 (emphasis added). A tribe's political existence does not confer territorial sovereignty. *See, e.g.*, S. Rep. 112-166, at 7 (2012) (noting that "a number of federally recognized Indian tribes do not have a land base"). Congress need not extinguish the pilot light of tribal existence to disestablish reservation borders.

Congress's reasons for continuing tribal government were purely practical. As the March 4, 1906 date approached, the Dawes Commission had not completed allotment. Carter 170–71. Because the tribes held title to undistributed land, some form of tribal government may have been necessary to sign deeds conveying allotments. 40 Cong. Rec. at 3064 (Sen. Nelson); *see also id.* at 1241 (Sen. Curtis); *Statehood Hearing* 117 (Mr. Howe). Congress also aimed to ensure that the tribal schools would not abruptly disappear, 40 Cong. Rec. at 3054 (Sen. Long), and to prevent the possible transfer of land to railroad companies that held contingent land grants, *id.* at 2976 (Sen. McCumber); *id.* at 5046 (Sen. Clapp). Continuing tribal existence did not restore any sovereign powers.

Contemporaneous statements by tribal leaders confirm that tribal governments could exercise no

territorial authority except to sign deeds. As Chief Porter wrote to the Creek Nation in June 1906, after Congress extended tribal government:

> We are now under the control and government of the United States. The Creek laws have long since been suspended so far as the administration of civil or criminal affairs are concerned. The only laws now in force are the treaties made for the distribution and allotment of our lands. It is well known that any other government will never be established for the government of the Indians, except such government as the United States shall or may establish. ... To hope for, or look for any other than this, is utterly useless, and can never be realized.

Letter of Pleasant Porter to Creek Nation, Indian Journal (Indian Territory), June 15, 1906 (*Porter Letter*). Similarly, the Choctaw governor testified in November 1906 that his tribe had "only a shell of a government, it is hardly anything. ... I do not feel any longer that I act as chief, that I have any authority. ... Now, the only authority that I have is to sign deeds." S. Rep. 59-5013, pt. 1, at 885. This sentiment was echoed by the Cherokees' attorney, who testified that "the tribal government shall cease, and they have already ceased to all intents and purposes. There is nothing of tribal governments left now but a shell. They have no authority except to sign the deeds transferring title from the tribe to the allottee ... ." *Statehood Remarks* 33.

It was universally understood that tribal governments were "a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to

do business, and are practically dissolved, for the purpose of winding up their affairs." *United States v. Allen*, 171 F. 907, 921 (E.D. Okla. 1909). Any other conclusion ignores history. As historian Angie Debo described the situation for the Choctaw Nation, with the passage of the Five Tribes Act, "tribal government in every real sense ceased to function." *Rise and Fall* 289.

The dim flicker of tribal government at statehood does not prove that the Creek Nation possessed a reservation. Quite the opposite. By showing that Congress breached its treaty promises through dissolving tribal lands, subjecting the territory to statehood, and stripping the tribes of their territorial sovereignty, the State has easily overcome any presumption that the land patents modified in 1866 demarcate a current reservation.

II. Congress's transfer of jurisdiction over Indians to Oklahoma state courts is incompatible with reservation status.

Congress expressly withdrew the aspect of reservation status at issue in this case—federal criminal jurisdiction—over Indians residing in the former Five Tribes' territories.

1. Beginning in 1897, Congress abolished tribal courts, made tribal law unenforceable, and established federal territorial courts to hear criminal cases under Arkansas law, regardless of the defendant's race. Indian Department Appropriations Act of 1897, ch. 3, § 1, 30 Stat. 83; *Marlin*, 276 U.S. at 61–62; *Miller*, 235 U.S. at 424–25; Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573. If the Creek Nation's territory had remained intact as a "reservation" post-statehood, criminal cases involving Indians would

have remained in federal court under the Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153(a)).

Congress in the Oklahoma Enabling Act directed a different course. Congress transferred all pending federal-question and diversity cases to the newly created federal courts in Oklahoma, § 16, 34 Stat. 276, and *all* other cases to the newly created state courts, §§ 17–20, 34 Stat. 276–77. The only way to reconcile the Enabling Act with the Major Crimes Act is to conclude that the Major Crimes Act was irrelevant because the area in former Indian Territory was not, in fact, an Indian reservation.

That conclusion is also the only way to reconcile what actually transpired with criminal jurisdiction at statehood. State courts became the "legal successor" to the territorial courts for criminal offenses committed before statehood, even by Indians. *Haikey v. State*, 105 P. 313, 314 (Okla. Crim. App. 1909). Respondent concedes that "Oklahoma after statehood indeed asserted absolute criminal and civil jurisdiction," Opp. 4, which is "[t]he single most salient fact," *Rosebud Sioux*, 430 U.S. at 603.

Upon statehood, the territorial courts transferred pending nonfederal cases to state courts—including cases involving major crimes that ordinarily would have been subject to federal jurisdiction had the entire former Indian Territory remained Indian country. For instance, in *Jones v. State*, 107 P. 738 (Okla. Crim. App. 1910), a federal grand jury before statehood had indicted a Choctaw tribal member for murder committed in Choctaw country, but he "was tried after statehood by the district court of Atoka county."

Id. at 738–39.[9] Another case involving a pre-statehood crime with the defendant, victim, and witnesses, "all being Indians," was likewise transferred from territorial court to state court after statehood. *Phillips v. United States*, 103 P. 861, 861 (Okla. Crim. App. 1909). These cases are the tip of the iceberg. Reported opinions from Oklahoma state courts shortly after statehood provide numerous examples of criminal cases involving Indians transferred from territorial to state courts.[10]

Records of the federal territorial courts from the time of statehood are replete with others. Chepan Harjo, Webster Harjo, and Houston Watts, all tribal members, were charged with assault to kill in the U.S. Court for the Indian Territory, Western District, on June 25, 1907. The territorial court transferred the case to state court on February 10, 1908. Criminal Bench Docket for the Indian Territory, Western District 40, Docket Entry No. 9433, 21-OK-TN29. Newman Boone, a tribal member, was charged with murdering another Indian in the Western District in July 1907; his case was transferred to state court on April 8, 1908. *Id.* at 26, Docket Entry No. 9379.

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[9] Mr. Jones identified himself as a Choctaw member in his brief before this Court. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 4, *In re Jonas Jones*, 231 U.S. 743 (1913).

[10] *Sharp v. United States*, 118 P. 675 (Okla. Crim. App. 1911); *Wilson v. United States*, 111 P. 659 (Okla. Crim. App. 1910); *Bailey v. United States*, 104 P. 917 (Okla. Crim. App. 1909); *Keys v. United States*, 103 P. 874 (Okla. Crim. App. 1909); *Price v. United States*, 101 P. 1036 (Okla. Crim. App. 1909). The Dawes Rolls indicate the Indian identity of the defendants in these cases and in *Haikey*, 105 P. 313. *See* Oklahoma Historical Society, *Search the Dawes Final Rolls and Applications*, www.okhistory.org/research/dawes.

Ramsey Bass, a tribal member, was charged with the murder of another Indian in the Western District on July 30, 1907; his case was transferred to state court on February 13, 1908. *Id.* at 36, Docket Entry No. 9417. Tom Phillips, a tribal member, was charged on February 14, 1907, in the U.S. Court for Indian Territory, Central District, with assault to kill; he was subsequently tried in state court. *United States v. Phillips*, No. 6213 (Okla. Dist. Ct., Pittsburg County). And Will Prewett was charged on August 30, 1907, with the murder of tribal member Sam Tobley in the U.S. Court for Indian Territory, Central District. The state court issued a new indictment after statehood, on January 6, 1908.[11] So complete was this transfer of jurisdiction to the State that by 1908, the federal prison at Fort Smith, Arkansas, had "become nearly empty ... by reason of the admission of Oklahoma to statehood." Dep't of Justice, *Annual*

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[11] The tribal membership of these defendants or their victims is noted on the indictment form or mentioned in contemporaneous newspaper articles. *See An Epidemic of Crime*, Shawnee News, Aug. 6, 1907, at 4 (noting that Ramsey Bass was charged with the murder of Willie Johnson, "a young Indian" shot to death near an Indian church), goo.gl/L3s4t9; *Try Outlaw Stunt*, Shawnee News, July 2, 1907, at 7 (describing Chepan Harjo, Webster Harjo, and Houston Watts as "three Indian boys" detained in federal prison and charged with intent to kill), goo.gl/bpZLHp; *Cases Are Postponed: Two Eufala Murder Trials Are Put Off*, Oklahoma State Capital, Mar. 24, 1909, at 1 (noting that the case of Newman Boone, charged with killing "another Indian" in July 1907, had been "postponed until the next term of district court"), goo.gl/ssMFMb. The National Archives facility in Fort Worth houses the case files from the territorial courts, as well as criminal bench dockets for the Western and Southern Districts for Indian Territory.

Report of the Attorney General of the United States 16 (1908).

Likewise, the State assumed jurisdiction over new prosecutions for major crimes committed by Indians in the former Indian Territory immediately after statehood. *E.g.*, *Rollen v. State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912) (defendant "was a Cherokee citizen"); *Bigfeather v. State*, 123 P. 1026 (Okla. Crim. App. 1912). Conversely, the federal authorities ceased prosecuting such offenses. The criminal case files from the new federal district court for the Eastern District of Oklahoma, for instance, include only prosecutions for offenses arising under federal law, such as violations of postal law. The State is aware of no cases from statehood to today where federal authorities prosecuted an Indian on the premise that the former Indian Territory was a reservation.

This Court, too, understood from the outset that Congress transferred jurisdiction over Indians in the former Indian Territory to the State of Oklahoma. In *Hendrix v. United States*, 219 U.S. 79 (1911), a tribal member indicted for murder in Indian Territory had successfully moved to transfer his case to a federal court in Texas under a special venue statute for fair trials. Relying on the Enabling Act's transfer of jurisdiction to state courts, the defendant argued after statehood that the federal court lacked jurisdiction to try him. *Id.* at 89. This Court rejected that argument, but in doing so did *not* hold that federal courts had exclusive jurisdiction under the Major Crimes Act. Rather, the Court held that the specific venue statute continued to apply to pending cases. *Id.* at 90–91. The United States acknowledged that, but for the special venue provision, Congress gave the State jurisdiction over crimes involving Indians. U.S.

Br. at 12, *Hendrix v. United States*, No. 319 (U.S. 1910) ("[T]he enabling act ... and the subsequent organization of the State withdrew [Indian Territory] from the exclusive jurisdiction of the United States.").

2. If the former territory of the Creek Nation were a reservation after 1907, none of these transfers would have occurred, none of these convictions would have been valid, and the federal government would have inexplicably ignored its authority to prosecute major crimes involving Indians in eastern Oklahoma for the past 111 years. Respondent has no answer other than to state the implausible: that Oklahoma asserted criminal jurisdiction illegally over tens of thousands of cases spanning the last century. Opp. 28–29 n.7. But that ignores the express transfers of jurisdiction in the Enabling Act. And even without that Act, a far more plausible explanation for the contemporaneous transfer of criminal cases involving Indians is that the former Indian Territory was not a reservation subject to the Major Crimes Act.

In *Hagen v. Utah*, the state's immediate and longstanding "assumption of authority" over "the opened lands" was powerful evidence of diminishment. 510 U.S. at 421. The Court highlighted the "sharp contrast to the situation in *Solem*, where 'tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing ... the opened lands during the years following 1908.'" *Id.* (quoting *Solem*, 465 U.S. at 480). The Court held that Utah's "'jurisdictional history' ... demonstrates a practical acknowledgment that the Reservation was diminished." *Id.*

3. The existence of reservations following statehood would have left an implausible jurisdictional

gap over the vast majority of Indian-on-Indian crimes. Federal courts have no jurisdiction over non-major crimes "committed [in Indian country] by one Indian against the person or property of another Indian." 18 U.S.C. § 1152; Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (2017), goo.gl/uXKgQT. And Creek courts were abolished in 1898.

If, on respondent's theory, state courts also possessed no jurisdiction over Indians in the former Indian Territory, then *no* court could have overseen prosecutions of Indians for committing such crimes as assault, bribery, forgery, and rioting against other Indians within the former Indian Territory until Congress authorized the reestablishment of tribal courts in Oklahoma in 1936. *See* Act of June 26, 1936, ch. 831, § 2, 49 Stat. 1967. Given Congress's hyper-concern about rampant crime in Indian Territory—one of the primary reasons Congress embarked on the formation of the State of Oklahoma, *supra* pp. 6–7—Congress could not plausibly have intended to create a jurisdictional void that would reintroduce the very misrule that Congress spent decades trying to eradicate. In short, the entire history of criminal prosecution in Oklahoma has been premised on the universal acknowledgment that the Five Tribes' former territories are not "Indian country" by virtue of reservation status.

4. Respondent's contention would also render inexplicable the numerous cases that delineated "Indian country" in the former Indian Territory following statehood. For nearly a century, court battles raged over whether the State had criminal jurisdiction over restricted allotments in the former Indian Territory, or whether such allotments constituted "Indian coun-

try" subject to federal jurisdiction. *See, e.g.*, *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936) (holding that restricted allotments in the former Indian Territory did not constitute "Indian country" for purposes of the General Crimes Act of 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152)); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (holding that restricted allotments are "Indian country" under 18 U.S.C. § 1151(c)); *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992) (same).

Those debates would have been moot were the *entire* former Creek territory—indeed the entire Indian Territory—a reservation after statehood. Any piece of land within old tribal boundaries would be Indian country by virtue of its "reservation" status; courts would have had no need to engage in the laborious process of identifying whether "isolated tracts" in the "checkerboard" of federal jurisdiction constituted Indian country. *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 429 n.3 (1975); *see, e.g.*, *Magnan v. Trammell*, 719 F.3d 1159, 1171 (10th Cir. 2013) (considering whether restrictions on mineral interests established that a particular plot of land was Indian country); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (similar with respect to trust-land status). "[I]f the land or area in question was an Indian reservation," a determination that the land constituted Indian country for some other reason "would be moot and not necessary." *United States v. Adair*, 913 F. Supp. 1503, 1515 (E.D. Okla. 1995) (concluding that land was not a dependent Indian community and therefore not Indian country).

The same logic applies to *U.S. Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911) (cited at Opp. 11, 22, 28). That case held that 3,000,000 acres of

land yet to be allotted remained Indian country under federal liquor laws. 191 F. at 678–79. Whether land remained unallotted would have been irrelevant were the entire area a reservation subject to federal oversight.

III. The court below erred in applying *Solem*.

The court below assumed this dispute was an ordinary reservation-diminishment case governed by the framework set forth in *Solem*, 465 U.S. 463. Pet. App. 74a. It is thus no surprise that the court, scouring the historical record for inapposite indicia of legislative intent, did not find what it was looking for. And even were *Solem*'s framework the sole lens through which a court could ascertain congressional intent, Congress's intent to disestablish the Creek Nation's geographic and sovereign borders is clear and unambiguous.

A. *Solem* does not govern the dissolution of the Five Tribes in preparation for Oklahoma Statehood.

This Court's *Solem* cases involve a specific fact pattern: whether Congress diminished land set aside by the federal government as an Indian reservation within an existing State when Congress opened the area for non-Indian settlement on surplus lands following allotment.[12] This question became relevant because Congress in the late 19th century adopted

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[12] *See, e.g.*, *Parker*, 136 S. Ct. 1072 (Omaha Indian Reservation, Nebraska); *Solem*, 465 U.S. 463 (Cheyenne River Sioux Reservation, South Dakota); *Mattz v. Arnett*, 412 U.S. 481 (1973) (Klamath River/Hoopa Valley Reservation, California); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (Colville Reservation, Washington).

"the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." *Solem*, 465 U.S. at 466. Congress enacted the General Allotment Act to open traditional reservations across the country for settlement through allotment and the subsequent sale of unallotted lands. 24 Stat. 387. *Solem* thus guides courts in determining whether "any particular surplus land act" "formally sliced a certain parcel of land off one reservation." *Solem*, 465 U.S. at 468, 472; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Mattz*, 412 U.S. at 496–97.

Solem assumes a reservation exists and proceeds to determine what particular lands retain that status. That is not the situation here, where respondent cannot identify what sort of reservation he thinks continues to exist post-statehood, given that Congress clearly extinguished the Five Tribe's land patents, abrogated the material promises in treaties that established their territories, and dissolved tribal sovereignty. *Compare Yankton*, 522 U.S. at 345–46 (finding disestablishment despite Congress's preservation of treaty that established reservation).

In ordinary disestablishment cases, "surplus land acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests." *Solem*, 465 U.S. at 468; *see also Yankton*, 522 U.S. at 343–44. But here, Congress explicitly extinguished the Creeks' territorial sovereignty altogether. In such circumstances, Congress had no reason also to include express language erasing tribal boundaries; those borders vanished as a logical extension of taking all sovereign power from the tribe and bestowing it on the new State.

This case also involves no ordinary allotment. Congress exempted the Five Tribes from the General Allotment Act. § 8, 24 Stat. 391. Nor is this case about the sale of surplus land to non-Indians. Rather, allotment of the Five Tribes' lands was inextricably intertwined with Congress's systematic and deliberate liquidation of the Five Tribes as territorial sovereigns to pave the way to create a new State. Hence, "'[a]nomaly' is the best single word to characterize Oklahoma history. Oklahoma has more anomalies—has deviated more from the general pattern of state evolution—than any other state." Gibson 3. These distinctions show why Chief Judge Tymkovich suggested that "the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood." Pet. App. 232a. At a minimum, the panel erred in holding that the state court's decision was contrary to clearly established federal law under 28 U.S.C. § 2254(d). Pet. App. 44a.

Considering the unique measures it took to dissolve the Five Tribes' land tenure, Congress did not need to use the traditional "hallmark" language of diminishment to extinguish the Creek boundaries: words equivalent to "cede," a "lump-sum payment," or restoration of the land to "public domain." Pet. App. 76a–77a. Because Congress expressly viewed allotment and cession as alternative means to the same end, Act of Mar. 3, 1893, § 16, 27 Stat. 645, the jurisdictional result was the same: disestablishment. Words of cession and purchase in surplus land acts show diminishment, but such words were unnecessary here, where Congress used allotment to achieve the same result as cession, *i.e.*, elimination of tribal territory. And Congress could not have "restored" to the "public domain" lands that had not been reserved

out of the public domain, but that were conveyed to the tribes in communal fee. Likewise, Congress had no need to offer a "lump-sum payment" to the tribe because tribal dissolution was imminent and the Five Tribes' lands were conveyed through allotment to their own members rather than to the federal government.

B. Creek boundaries were disestablished even under *Solem*.

Congress disestablished the Creek Nation's borders even under *Solem*. The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. *Solem*'s three-factor test is simply a guide for discerning that intent. *Hagen*, 510 U.S. at 410–11; *Rosebud*, 430 U.S. at 588 & n.4. A "traditional approach to diminishment cases" thus requires an examination of "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412.

1. At *Solem*'s step one—statutory text—the evidence is overwhelming that no reservations exist in eastern Oklahoma today. Congress expressly repudiated every material promise made to the Five Tribes that could be said to make the area a "reservation" to begin with. Congress expressly dismantled tribal title to land. Act of March 3, 1893, § 16, 27 Stat. 645; Curtis Act § 11, 30 Stat. 497; Creek Allotment Agreement § 3, 31 Stat. 862; Supplemental Allotment Agreement §§ 2, 4, 32 Stat. 500–01. Congress expressly revoked the tribes' jurisdiction over their members and property. Curtis Act §§ 26, 28, 30 Stat. 504–05; Five Tribes Act §§ 16–17, 34 Stat. 143–44. Congress expressly made the Indian Territory

part of a State. Oklahoma Enabling Act § 1, 34 Stat. 267. And Congress expressly granted state courts (and withheld from federal courts) jurisdiction over cases like this one. §§ 16–17, 34 Stat. 276–77.

Respondent errs in speculating (Opp. 4, 8, 24) that, because language of "cession" is absent in the run-up to statehood, the tribes successfully negotiated for allotment as opposed to cession to keep their territorial borders intact. The tribes acknowledged that allotment and cession were equivalent, and that allotment to achieve statehood meant "giving up the rights" to "our beloved public domain." S. Doc. 54-111, at 4 (1897). The tribes' express agreement to their own governments' termination would have been inexplicable had they believed that they chose allotment to preserve their territorial sovereignty. *Supra* p. 12. Even though tribal governments continued, this agreement shows Congress's "purpose of disestablishment," and "there is no indication that Congress intended to change anything" about that purpose with later acts. *Rosebud*, 430 U.S. at 591–95; *Hagen*, 510 U.S. at 415.

The historical record is full of acknowledgements from the tribes that allotment signaled the end of tribal sovereignty and was the functional equivalent of cession. In their memorial to the Dawes Commission in 1897, the Creeks acknowledged that allotment "unavoidably involves a change of government" and was the harbinger of "the civil death of the Muscogee Nation." S. Doc. 54-111, at 1, 4. Chief Porter, addressing the Creek legislature in 1904, described the allotment acts as "acts of dissolution of our tribal government and the partition of our common property," noting that "[a]s soon as our landed and monied interests have been distributed, our government will

come to an end." *Message of Pleasant Porter to the Honorable Members of the House of Kings and Warriors*, Muskogee Phoenix, Oct. 4, 1904. Even after Congress extended the tribal governments, *supra* pp. 12–13, Chief Porter explained to members that there was no longer—and would never be—anything left of the Creek Nation's sovereignty once allotment was complete. *Porter Letter*.

Likewise, the court below erred in contrasting allotment for statehood with the Creeks' earlier express cessions of land to the United States. *See* Pet. App. 99a–100a. Again, the act creating the Dawes Commission expressly conceived of allotment and cession as alternative means to extinguish tribal title to pave the way for statehood. Act of Mar. 3, 1893, § 16, 27 Stat. 645.

2. At step two, this Court considers the historical context of the relevant statutes. Thus, "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act"—and again, this is not a surplus land act case—"unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton*, 522 U.S. at 351.

Throughout negotiations and the legislative process, Congress, the executive branch, and tribal leaders all understood that Congress—through a series of statutes—was abrogating the treaties, destroying tribal sovereignty, ending Indian interests in the land, and creating a new State through undifferentiated union with the Oklahoma Territory. No one believed that Congress left the entire eastern half of this new State as Indian country in perpetuity. *Supra* pp. 23–32.

The court below mistakenly assumed that dissolution must occur in a single step and thus searched for one specific statute disestablishing the Creek territory at one specific time. *Contra Rosebud*, 430 U.S. at 606 n.30; *Hagen*, 510 U.S. at 415. In *Rosebud*, the legislation opening reservation lands to settlement did not explicitly diminish the reservation; nevertheless, this Court held that an earlier but unratified agreement established an "unmistakable baseline purpose of disestablishment" that was "carried forth and enacted" in subsequent legislation. 430 U.S. at 590–92.

The decision below also criticized the State for relying on the "overall thrust" of congressional action, insisting instead that petitioner single out "particular statutory language" that alone effected disestablishment. Pet. App. 77a. But death by a thousand cuts is still death, and both Congress and the tribes acknowledged this hard truth. *Supra* pp. 29–31; 31 Cong. Rec. at 5593 (Sen. Bate) ("[W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed.").

3. At step three, *Solem* requires careful consideration of subsequent history and demographics—a "practical acknowledgement" of disestablishment—to avoid upsetting "the justifiable expectation of people living in the area." *Hagen*, 510 U.S. at 421; *accord Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 356–57; *DeCoteau*, 420 U.S. at 449. A "longstanding assumption of jurisdiction by the State" is inconsistent with reservation status. *Rosebud*, 430 U.S. at 604–05; *see also Yankton*, 522 U.S. at 357.

Oklahoma's post-statehood history confirms disestablishment in spades. Soon after statehood, Congress required the tribes, on pain of fine or imprisonment, to transfer possession of all tribal property and funds, and for all tribal officers and representatives to surrender all "books, documents, records or any other papers" to the Secretary of the Interior. Act of May 27, 1908, ch. 199, § 13, 35 Stat. 316. Congress stripped away most of the remaining restrictions on alienation of allotments, and subjected unrestricted allotments to state taxation regardless of whether the allotments were still owned by tribal members. §§ 1, 4, 35 Stat. 312; *see also* Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239–40; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; *Waters Run* 178–79; Carter 176. Within twenty years of statehood, roughly 89% of the former territories of the Five Tribes was free from any restrictions on alienation. *See* Dep't of Interior, Bureau of Indian Affairs, *Extracts from the Annual Report Relating to the Bureau of Indian Affairs* 24 (1927).

Congress soon placed even restricted allotments under state control. Congress made conveyances by full-blood and half-blood tribal members subject to state-court approval. Act of May 27, 1908, § 1, 35 Stat. 315; Act of April 10, 1926, § 1, 44 Stat. 239; Act of Aug. 4, 1947, § 1, 61 Stat. 731. In 1918, Congress granted Oklahoma state courts jurisdiction over heirship determinations in cases involving members of the Five Tribes, and subjected full-blooded tribal members' allotments to Oklahoma law regarding the partition of real property. Act of June 14, 1918, ch. 101, 40 Stat. 606. Vesting control over the disposition of even restricted allotments in *state courts*—particularly when Congress reserved federal authori-

ty over such matters with regard to lands held by members of other tribes, *see* Act of June 25, 1910, ch. 431, §§ 1, 2, 36 Stat. 856—would make little sense had Congress intended to preserve the entirety of the Five Tribes' former territories as a reservation.

Oklahoma's assertion of state regulatory power over its territory confirms that the Five Tribes had lost anything resembling reservation status. States could not levy property taxes on reservation lands. *See Worcester*, 31 U.S. (6 Pet.) at 592; *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). But that blanket prohibition never applied to eastern Oklahoma after statehood. Rather, Oklahoma's taxing power was limited only by specific legislation exempting restricted lands from taxation. Five Tribes Act § 19, 34 Stat. 144; Act of May 27, 1908, ch. 199, § 4, 35 Stat. 313; Okla. Const. art. X, § 6; *see also Board of Cty. Comm'rs v. Seber*, 318 U.S. 705 (1943). "As soon as the title ... to the land in question became vested in [the allottee], it was subject to taxation by the state and county authorities ... ." *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913).

Since statehood, courts have understood that no reservations exist in Oklahoma. *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010) (collecting authority). In 1914, this Court heard "a suit to quiet the title to lands within what *until recently was* the Creek Nation in Indian Territory." *Miller*, 235 U.S. at 423 (emphasis added); *Grayson v. Harris*, 267 U.S. 352, 353 (1927) (describing land "lying within the former Creek Nation"); *Woodward*, 238 U.S. at 285 (describing land "formerly part of the domain of the Creek Nation"). Additionally, the Court wrote in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), that Indian tribes were once "separate politi-

cal entities with all the rights of independent status—a condition which has not existed for many years in the State of Oklahoma." *Id.* at 602. This Court continued: "[The tribes] have no effective tribal autonomy" and "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; *see also McDougal*, 237 U.S. at 383 ("[W]hen ... the time came to disband the tribe, its ownership [of tribal property] as a political society could no longer continue ... .") (quoting *Shulthis v. McDougal*, 170 F. 529 (8th Cir. 1909)).

Likewise, Congress has recognized that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. 74-1232, at 6 (1935), and accordingly has defined the term "reservation" for certain statutory purposes to include "*former* Indian reservations in Oklahoma." 25 U.S.C. § 1452(d) (emphasis added); *accord* 12 U.S.C. § 4702(11); 16 U.S.C. § 1722(6)(C); 25 U.S.C. §§ 2020(d)(1)–(2), 3103(12), 3202(9); 29 U.S.C. § 741(d); 33 U.S.C. § 1377(c)(3)(B); 42 U.S.C. §§ 2992c(3), 5318(n)(2). And the executive branch—from statehood to today—has never deviated from its position that no Indian reservations now exist in Oklahoma. U.S. Cert. Br. 13–14, 19 n.5.

Respondent observes (Opp. 10) that annual reports by the Bureau of Indian Affairs list the Creek Nation on schedules "showing each Indian reservation." Creek C.A. Amicus Br., Ex. B. If anything, these tables reinforce that allotment disestablished the Creek boundaries by whittling away the tribal patent. The tables define the "area" of the purported Creek reservation as lands "not allotted nor specially reserved." *Id.* at 10. The Creek "area" diminished from 3,079,086 acres in 1902 (*i.e.*, the full patent), to

626,044 acres in 1906, leaving a mere 503 acres by 1913, when allotment was concluding. *Id.* at 2, 8, 20.

Finally, the decision below upsets a century of settled expectations across half of Oklahoma, including the major metropolitan area around Tulsa. The criminal implications would be seismic. U.S. Cert. Br. 20–22. So would the civil ones. 1.8 million Oklahomans live in eastern Oklahoma. Their lives would be drastically changed if this Court were suddenly to declare them all residents of an Indian reservation. *See* Pet. 18–20; Cert. Reply 4. Local farmers, ranchers, and other businesses already worry about "significant risk and uncertainty" in topics ranging from taxation to construction permits under the decision below. *See, e.g.*, Envtl. Fed'n of Okla. Cert. Amicus Br. 6–13; OIPA Cert. Amicus Br. 5–15. Consider just the effect on family-law matters. Under the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, tribes have "jurisdiction exclusive as to any State" over custody proceedings involving any child eligible for tribal membership "who resides or is domiciled" on a "reservation." 25 U.S.C § 1911(a). Tribal courts would become the sole arbiter of parental rights, child custody, foster care, and adoptive placement if the child met the broad definition of an "Indian child." *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

It is no overstatement to say that affirming the decision below would forever redefine the State's identity and redraw the map of Oklahoma into a simulacrum of its pre-statehood form.

* * *

The Five Tribes' former territories are today an integral part of the State of Oklahoma, home to nearly half of the State's population, and an engine of economic growth. Over the century since statehood, generations of tribal members and non-Indians—together, equal, unified—have built their lives in Oklahoma on the understanding that the former Indian Territory and Oklahoma Territory merged to form a new, undivided State, and that, in the process, the Five Tribes' territorial sovereignty and boundaries became legacies of the past, giving way to a single state government. To hold that Congress never achieved this long-sought goal would deny the extraordinary and difficult history that the Five Tribes endured, and betray the promises made to the people of Oklahoma more than a hundred years ago.

CONCLUSION

The decision below should be reversed.

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Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Whether Congress disestablished the reservation of the Muscogee (Creek) Nation.

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INTRODUCTION

Three terms ago, this Court unanimously reaffirmed that *Solem v. Bartlett* provides the "well settled" framework for assessing disestablishment. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). "[O]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots," the whole area "retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress's intent to disestablish must be "clear[]." *Id.* This Court starts with the "statutory language" (the "most probative" evidence of congressional intent). *Parker*, 136 S. Ct. at 1079. It then turns to "circumstances surrounding" the statutes (principally, "the manner in which the transaction was negotiated"). *Id.* at 1079, 1081. Last (and least) is "subsequent history." *Id.* at 1081.

Here, the Tenth Circuit correctly and unanimously applied *Solem* to conclude the Creek reservation remained intact. The relevant statutes nowhere use the "hallmark" disestablishment language—"cession" to the United States, restoring lands to the "public domain," and so on—this Court has identified as manifesting Congress's intent to go beyond altering land title to diminish reservation boundaries. *Id.* at 1079. While "magic words" are not required, Pet. App. 62a, the absence of *any* clear disestablishment language here is telling indeed. When Congress diminished Creek lands in 1832, 1856, and 1866, it used hallmark language of "cession." When Congress set goals for negotiators dispatched to the Creek in 1893, it told them by statute to seek "cession." And when those agents returned, they

informed Congress that the Creek refused to "cede any portion of their land." J.A. 19.

Solem's test thus confirms that Congress never disestablished the Creek reservation, and that the federal government, not Oklahoma, had jurisdiction over Respondent's capital murder trial. As Chief Judge Tymkovich observed, this Court's "precedent precludes any other outcome." Pet. App. 230a.

With no real argument under *Solem*, Oklahoma invokes its "unique circumstances," Br. 21, and urges that *Solem* not be "[s]trictly appl[ied]," Br. 18 (quotations omitted). But Oklahoma's circumstances cannot justify jettisoning *Solem*. Every State arguing for disestablishment invokes its own special history. Nebraska did so in *Parker*. But *Solem*'s point, reaffirmed in *Parker*, is to prevent such *ad hoc* and atextual resolutions.

Moreover, the State is wrong that statutes governing Indian reservations in Oklahoma are uniquely exempt from a focus on the text. Like other Allotment Era statutes, the statutes here involve allotment of lands to tribal members, with the sale of additional lands to non-members. This Court has done with those Allotment Era statutes what it *always* does with statutes: It has parsed their text to determine Congress's intent.

Bereft of text, Oklahoma weaves a tale that, as a prerequisite to statehood, Congress eliminated communal land ownership and dissolved the Creek government, thereby abrogating entirely the treaties with the Creek and disestablishing (*sub silentio*) the

Creek reservation. But on every score, Oklahoma is wrong.

The method Congress used to end communal land tenure cuts sharply against—not for—the State. The Creek allotment agreement specified that, aside from about 10,000 acres in "town sites," "[a]ll lands of [the] tribe ... shall be allotted among the [tribe's] citizens." Act of Mar. 1, 1901, ch. 676, § 3, 31 Stat. 861 ("Allotment Agreement"). That kept the vast majority of land in Indian hands. When Oklahoma became a State, nearly 85% of Indian Territory—16.6 million acres—remained inalienable and immune from (among other things) state taxation. Congress thus did not share Oklahoma's view that statehood required subjecting tribal lands to full state regulation.

Likewise, Congress's treatment of Creek government proves the opposite of what the State suggests. True, Congress in 1901 provided for eventual dissolution of Creek government. But when dissolution loomed, Congress "continued" the government "in full force and effect for all purposes." Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137 ("Five Tribes Act" or "FTA"). Moreover, Congress did so precisely to prevent tribal lands from returning to the "public domain"—the very step that would yield disestablishment—because that would have caused a massive, undesired transfer of Indian lands to railroads.

Nor is there anything to the State's suggestion that, if Congress expressly repeals some treaty provisions, it implicitly repeals all the rest. That "breach-one-breach-all" canon of treaty interpretation emerges from whole cloth. Regardless, the Allotment Agreement provides

the opposite, preserving "existing treaties between the United States and said tribe." Allotment Agreement § 44. And Oklahoma's Enabling Act, too, expressly preserved Indian rights.

This case thus illustrates why the Court resists efforts to turn statutory interpretation into a storytelling contest. Oklahoma depicts a single-minded "Congress" doggedly pursuing a single purpose—statehood, with disestablishment as a prerequisite—from 1893 to 1906. But reality was far messier. As the drive for total assimilation gave way to recognition that tribes would endure, battles were waged among many factions—settlers, assimilationists, and tribes, among others, each with congressional allies. The slow but steady reversal of congressional policy saw pro-tribal forces lose some battles but win others. As is often true, legislation reflected "the art of compromise." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

That is why the Court "will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law." *Id.* Instead, the Court "will presume more modestly ... 'that [the] legislature says ... what it means and means ... what it says.'" *Id.* What decides this case is that on each critical issue, Congress *enacted text* that came down decisively on the side of preserving the Creek reservation. Having aimed at "cession" of lands to the federal government, Congress accepted allotment among tribal members. After legislating to abolish the Creek government, Congress continued it indefinitely. And while granting settlers' wish for statehood,

Congress preserved tribal rights and federal authority over tribes.

With neither text nor tale to support its position, Oklahoma and its *amici* fall back on claims about "settled expectations" and "turmoil." Br. 3, 56. But *Parker* rejected similar claims, and there is no reason for a different outcome here. As to criminal jurisdiction, the federal government has ample resources to handle additional prosecutions. On the civil side, settled doctrines sharply limit or eliminate jurisdictional consequences for non-Indians. If any problem arises, Congress regularly legislates to address state and tribal authority in Oklahoma, and Congress will be equally responsive here. But this Court's precedents reserve that choice *to Congress*.

That brings us back to where we began: Congress. Oklahoma insists that "[a]ll agree that this case boils down to congressional intent." Br. 4. But the parties' approach to determining that intent is quite different. In our view, "parsing statute after statute in search of specific language," Br. 21, is a virtue, not a vice. In our view, there is not one method of statutory interpretation for a "quaint little town such as Pender, Nebraska," Sheriffs' *Amicus* Br. 24, and another for Tulsa. And in our view, appeals to "the 'overall thrust' of congressional action," Br. 52, and "present-day reality," States' *Amicus* Br. 4, are no way to ascertain congressional intent.

The decision below should be affirmed.

STATEMENT OF THE CASE

A. Historical Background.

1. The Creek Reservation.

Along with the Choctaw, Chickasaw, Cherokee, and Seminole, the Muscogee (Creek) Nation is one of the "Five Tribes" that once occupied much of Alabama and Georgia. Pet. App. 63a. In the 1820s and 1830s, the "federal government adopted a policy to forcibly remove" them to "what is today Oklahoma"—Indian Territory. *Id.*

Congress entered into treaties in 1832, 1833, and 1856 guaranteeing the Nation's rights within its borders. Pet. App. 64a-65a. The Nation had "cede[d] ... all their land, East of the Mississippi." Treaty with the Creeks, art. I, Mar. 24, 1832, 7 Stat. 366 ("1832 Treaty"). In turn, Congress "guarantied" the "Creek country west of the Mississippi," *id.* art. XIV, reaffirming that it "shall constitute and remain the boundaries of the Creek country." Treaty with the Creeks, arts. II, III, Aug. 7, 1856, 11 Stat. 699 ("1856 Treaty"); *see* Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417 ("1833 Treaty"). These treaties "secured" to the Creek an "unrestricted right of self-government" and "jurisdiction over persons and property, within [its] limits." 1856 Treaty arts. IV, XV; *see* 1832 Treaty art. XIV (similar).

The Creek also received a fee-simple patent. *Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915). The patent was the dividend of the Trail of Tears. After the federal government told the Creek it was "powerless to prevent" Alabama's incursion on the Nation's land and rights, *United States v. Creek Nation*, 201 Ct. Cl.

386, 391 (1973), the Creek demanded a patent for greater security. It issued in 1852. *Woodward*, 238 U.S. at 293.

The Creek's present reservation boundaries reflect two cessions. In 1856, the Nation "cede[d]" lands to the Seminoles. 1856 Treaty arts. I, V. In 1866, the Nation "cede[d] ... to the United States" lands in return for $975,168. Treaty with the Creek, art. III, June 14, 1866, 14 Stat. 785 ("1866 Treaty").

2. The Allotment Era.

Not long after, the "Allotment Era" swept the West. As the 19th century waned, "Congress increasingly adhered to the view that the Indians tribes should abandon their ... communal reservations and settle into an agrarian economy on privately-owned parcels." *Solem*, 465 U.S. at 466. Congress passed a series of statutes that "allotted" some lands to tribal members and opened others to non-Indian settlement. "Initially, Congress legislated ... on a national scale" in the 1887 General Allotment Act, but it then moved to a "reservation-by-reservation" approach. *Id.* at 467.

In allotment's heyday, assimilationists in Congress believed allotment presaged "the imminent demise of the reservation," and they legislated "partially to facilitate the process." *Id.* at 468. Even so, allotment statutes varied, each reflecting "a unique set of tribal negotiation and legislative compromise." *Id.* at 467.

As the 20th century dawned, those compromises increasingly reflected skepticism toward the assimilationist enterprise: The "financial and intellectual forces behind assimilation and allotment were close to exhaustion." *Felix S. Cohen's Handbook*

of Federal Indian Law § 1.04 at 78 (Nell Jessup Newton eds. 2012) ("*Cohen's*"). Policymakers began "questioning whether total assimilation was desirable at all." Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians 1880-1920*, at 112-13 (2001 ed.). Given all that, the Court has not asked what legislators expected, vaguely, to happen, and it has declined to paint with a broad brush. Instead, it assesses the "effect of [each] act," examining the "language" to determine whether it effected disestablishment. *Solem*, 465 U.S. at 469.

3. Allotment And The Creek.

The Allotment Era played out in Indian Territory as well—its initial ambitions, and Congress's uneven but unmistakable retreat.

As elsewhere, allotment's spur was Congress's rising skepticism of Indians' "communal" land tenure. *Solem*, 465 U.S. at 466. Settlers "pressured Congress to break up the tribal land base, [and] attach freely alienable individual title." Pet. App. 67a. Meanwhile, Congress came to believe that while the Five Tribes' treaties provided that lands should be held "for the equal benefit of the citizens," "in practice" some "appropriate[d] to their exclusive use" the best lands. *Woodward*, 238 U.S. at 297, 299 n.2.

In 1893, Congress charged the Dawes Commission with negotiating changes. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612 ("1893 Act"). Congress hoped the Creek might agree to "cession of [all] or some part [of its territory] to the United States," as the Creek had done previously. *Id.* Congress directed the Commission to

negotiate "first, ... allotment," and "secondly, ... cession ... of any lands not found necessary to be so allotted." *Id.* Already, Congress saw that the Indian Territory might become a new State—but even at the Allotment Era's height, Congress did not believe statehood required disestablishment. Members did not see why these reservations "might not be respected and protected, and yet have them brought into the Union." 24 Cong. Rec. 268 (1893) (Sen. Perkins). Hence, the Commission assured the Creek that it did not wish "to interfere at all with the administration of public affairs" but only to "secur[e] ... their just rights under the treat[ies]." J.A. 23.

Even this softer approach was rejected. The Commission reported back that the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government." J.A. 19. Given "this unanimity," the Commission "abandon[ed]" this approach. *Id.*

Switching focus to obtaining a "cession"-free allotment agreement, Congress enacted laws in 1897 and 1898 that sought "to coerce tribes to negotiate." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988); Pet. App. 81a-82a. The acts abolished Creek tribal courts, Pet. App. 68a, though not the Creeks' legislative jurisdiction over their lands, *infra* at 10-11. The 1898 act—the "Curtis Act"—also established a "default allotment scheme" to take effect absent agreement. Pet. App. 81a-82a.

This induced a Creek allotment agreement, which Congress ratified in 1901. Pet. App. 82a. The Dawes Commission advised that matters would have been

"immeasurably simplified" had the Five Tribes agreed to "cession to the United States ... at a given price." J.A. 19. But it emphasized "the great difficulties which have been experienced in inducing the tribes to accept allotment," and explained "a more radical scheme of tribal extinguishment" was "impossible." *Id.* The Creek Allotment Agreement thus tilted dramatically toward keeping Creek land in Creek hands. While other tribes agreed to sell substantial tracts to non-Indians, the Creek agreement provided that "[a]ll lands ... shall be allotted among [Creek] citizens." Allotment Agreement § 3. The sole exception involved "town sites." *Id.* § 2. This land had outsized value, and some towns were home to up to 5,000 people, *see Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916), but this land accounted for only 10,694 acres of the Nation's 3-million-plus-acre reservation. Report of Dep't of Interior, 1910, vol. II, at 69 (1911), http://bit.ly/2pfnmVr.

The agreement preserved the Creek government's authority and rights. It recognized the Creek government's legislative authority over "the lands of the tribe, or of individuals after allotment," and specified that it "shall in no wise effect the provisions of existing treaties ... except so far as inconsistent therewith." Allotment Agreement §§ 42, 44. Shortly thereafter, the courts confirmed that Congress's coercive legislation had not divested the Five Tribes' jurisdiction over their reservations, and that Congress had instead "permit[ted] the continued exercise" of the tribes' "legislative ... power" "within [their] borders," enforced by federal officials. *Morris v. Hitchcock*, 194 U.S. 384, 389, 393 (1904); *see Morris v. Hitchcock*, 21 App. D.C.

565, 598 (D.C. Cir. 1903). In 1905, the Eighth Circuit applied this ruling to the Creek reservation, affirming Creek authority under the agreement to legislate over non-Indians in towns. *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905).

The Allotment Agreement put an expiration date on this authority, providing for dissolution of the tribal government by March 4, 1906. But this only presaged another congressional about-face. The agreement made dissolution "subject to such further legislation as Congress may deem proper." Allotment Agreement § 46. And when the moment came, Congress passed the 1906 Five Tribes Act. Disavowing dissolution, Section 28 "continued" the "present tribal governments ... in full force and effect for all purposes authorized by law." FTA § 28. The Act recognized the Nation's continuing authority to pass "act[s], ordinance[s]," or "resolution[s]." *Id.*; *see generally Harjo v. Kleppe*, 420 F. Supp. 1110, 1126-1132 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). In words unimaginable a decade earlier, members proclaimed that it "would be very much better indefinitely and for all time to continue" the tribal governments. 40 Cong. Rec. 3122 (1906) (Sen. Teller).

This reversal was not mere administrative convenience. Congress understood that vast swaths of Indian Territory had been granted conditionally to the railroads "whenever the Indian title shall be extinguished" and "said lands become a part of the public lands of the United States." Act of July 25, 1866, ch. 241, § 9, 14 Stat. 236. Members of Congress thus explained that the land was Indian land "so long as the Indians

exist as a tribe," but that "the moment the tribal interest in the property ceases," it "necessarily revert[s] to the Government," triggering the "railway grant." 40 Cong. Rec. 2976 (Sen. McCumber). And they emphasized that legislation "should be passed extending for a greater or less[er] time the tribal relations, in order that no rights may lapse or no rights may be transferred to railroad companies or to anybody else." *Id.* at 3053 (Sen. Aldrich).

As the push for statehood continued, deep divisions in Congress remained over Indian policy in the new State. The resulting legislation was "replete with compromises and maneuverings that added great complexity and ambiguity to the administration of Indian affairs." Tanis C. Thorne, *The World's Richest Indian: The Scandal over Jackson Barnett's Oil Fortune* 37 (2003) ("Thorne"). Pro-tribal legislators fought to protect Indian rights from those who had interests of non-Indian settlers in mind. *Id.* at 39. The decision to make Oklahoma a State was a substantial victory for settlers. But tribes and their allies won victories too. For one, in a suite of legislative gives-and-takes that encompassed the Five Tribes Act and the Enabling Act, pro-tribal forces "leverage[d] their demand for retroactive federal control over Indians of high blood quantum against the white Oklahomans' desire for statehood." *Id.*; *see* FTA § 19.

An even more important "victory for the [pro-tribal] protectionists" was that the Enabling Act "reinforced ... federal authority over Indians," imposing the "condition that the forthcoming Oklahoma state constitution could not limit federal authority over Indians within its

boundaries." Thorne at 41. The Enabling Act thus preserved federal supervision over Indians and required the new State to disclaim any rights over Indian lands. Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267 ("Enabling Act"). These provisions reaffirmed the United States' "control ... of the large Indian reservations and Indian population of the new State." *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

At statehood, the Indian Territory remained mostly controlled by Indians and the federal government. Of 19.6 million acres total, more than 16.6 million remained inalienable and immune from state taxation, largely in restricted allotments. H.R. Rep. No. 60-1454, at 2-3 (1908).

4. Assaults On The Creek Nation.

Those who lost battles in Congress refused to accept congressional statutes as the last word. So while the Creek suffered setbacks to land and government in ensuing decades, the reason—in large part—was lawlessness, not law.

The Bureau of Indian Affairs ("BIA") played a part. It opposed Congress's decision to preserve the Creek government. *Harjo*, 420 F. Supp. at 1130. So, in a campaign of "bureaucratic imperialism," it "behaved as though it had been successful" in forestalling that result, making "deliberate attempts" to "prevent [the Nation's government] from functioning." *Id.*

The BIA also did not protect the Creek from worse events on the ground. Oklahomans were determined to squash the nuances in federal policy, and to make the federal role in local affairs temporary and minimal.

Angie Debo, *And Still the Waters Run* 167 (1940). The platform of the Oklahoma Democratic Party (the new State's principal party) put it starkly: "We will take care of our own defectives of whatever race or color." *Id.* at 168.

Then came oil. Its discovery triggered "an orgy of plunder and exploitation probably unparalleled in American history," as Creek citizens were swindled out of allotments. *Id.* at 91; *see* Tim Vollmann & M. Sharon Blackwell, *"Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 Tulsa L.J. 1, 5 (1989). There was "legalized robbery" through courts, and entire land companies formed for the "systematic and wholesale exploitation of the Indian through evasion or defiance of the law." Debo at 117, 182. "Every member of the Dawes Commission and nearly every high Interior Department official ... was credited with stock in" the land companies. *Id.* at 92, 119-20. State courts and the Executive Branch conspired to undo alienation restrictions on millions of acres of Indian-owned land. *Id.* at 119, 182.

Massive tracts fell victim to the notorious Oklahoma guardianship system, a corrupt system of legalized local plunder of Indian lands. Section 6 of the Restrictions Act of 1908 had given Oklahoma county courts jurisdiction over estates of "minor[s] and incompetent[s]," a seemingly innocuous provision abused to devastating effect. Act of May 27, 1908, ch. 199, § 2, 35 Stat. 312. Many minors, for example, had substantial holdings of privatized lands and trust funds, "possess[ing] an estate varying in value from an average

farm to the great and speculative wealth represented by an oil allotment." Debo at 104. The county courts appointed for these wealthy wards "guardians," who quickly separated these minors from their wealth. "[P]lundering of children" "soon became a lucrative and highly specialized branch of the grafting industry." *Id.* at 103.

The treatment of wealthy adults was, remarkably, worse. Oklahoma county courts regularly appointed guardians for adult, full-blood Indians whose restricted lands held valuable resources. Thorne at 44; Debo at 305. Indeed, it soon became "apparent that all Indians and freedman who owned oil property were mentally defective." Debo at 305. "Within a generation these Indians, who had owned and governed a region greater in area and potential wealth than many an American state, were almost stripped of their holdings." *Id.* at vii.

Meanwhile, Oklahoma made outsized claims about its courts' jurisdiction over Indians, prosecuting Indians for crimes even on restricted allotments. *Ex parte Nowabbi*, 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936). Today, Oklahoma acknowledges that its prior position was unlawful. *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 81 & n.17 (Okla. 1985).

5. Today's Creek Nation.

As congressional policy changed, the "pilot light" of Creek government that Congress preserved, Br. 36, ignited to full flame. With the 1936 Oklahoma Indian Welfare Act, the Creek government "saw many of its powers restored," including judicial powers. Pet. App.

130a. Its new constitution, which the United States ratified, confirmed that Creek "political jurisdiction" is coextensive with its 1866 boundaries. Muscogee (Creek) Nation Const., art. I, § 2, http://bit.ly/2ODuKVG.

The Nation today is thriving. A driver of economic growth, it employs 5,000 people and commands an annual budget of $300 million (Tulsa's entire budget is roughly $800 million).[1] The Nation puts its resources to work for rural communities that, otherwise, would be under-resourced, helping Indians and non-Indians alike. The Nation builds roads, operates community hospitals, offers educational services, and provides other community resources.[2]

The Creek have a federally trained police force, with a dedicated K-9 Unit and a Major Crimes Investigation Division. Creek Nation 10th Cir. Reh'g *Amicus* Br. 8. Officers have cross-deputization agreements with the BIA and most of the 40 local governments within the reservation. *Id.* at 8-9.

The Nation has well-developed courts, whose jurisdiction "extend[s] to all the territory defined in the 1866 Treaty." *Enlow v. Bevenue*, No. SC-94-02, 1994 WL 1048313 at *2 (Muscogee Creek Nat. Sup. Ct. Oct. 13, 1994). A district court exercises criminal and civil jurisdiction, and a seven-member Supreme Court hears

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[1] Jessica McBride, *2018 Budget Passes During Emergency Session*, Mvskoke Media (Sept. 25, 2017), https://mvskokemedia.com/2017-budget-passes-during-emergency-session/.

[2] *See* Muscogee (Creek) Nation, http://www.okmulgeedevelopment.com/About-Okmulgee/Muscogee-Creek-Nation.aspx (last visited Sept. 11, 2018).

appeals. Muscogee Code, tit. 27, http://www.creeksupremecourt.com/wp-content/uploads/title27.pdf.

B. Factual Background.

Respondent Patrick Dwayne Murphy, a Creek, was convicted in state court of murdering another Creek. Pet. App. 10a, 15a. The crime occurred within the Creek reservation, near the tribal town of Weogufkee, on land allotted in 1903 to full-blood Creek Lizzie Smith. Pet. App. 7a, 47a, 213a, 224a. Respondent was sentenced to death, and the Oklahoma Court of Criminal Appeals ("OCCA") affirmed. Pet. App. 10a.

Respondent sought state post-conviction relief, arguing that Oklahoma lacked jurisdiction under the Major Crimes Act. Pet. App. 13a. The trial court held state jurisdiction was proper. Pet. App. 16a.

The OCCA affirmed. It noted that the Tenth Circuit had previously reserved the disestablishment question, and stated that if "federal courts remain undecided ..., we refuse to step in." Pet. App. 224a; *see Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 & n.3 (10th Cir. 1987). This Court denied certiorari. Pet. App. 18a-19a n.12.

On federal habeas, the district court denied relief on the reservation-status issue. Pet. App. 20a-21a.

The Tenth Circuit reversed. First, it found the OCCA's decision was "contrary to" clearly established federal law. The OCCA required "evidence that the Creek Reservation had not been disestablished," ignoring the "'presumption' that an Indian reservation

continues to exist until Congress acts." Pet. App. 52a (quoting *Solem*, 465 U.S. at 481).

The Tenth Circuit then analyzed disestablishment *de novo*. Pet. App. 56a. The Tenth Circuit began with *Solem*'s "most probative" step—"statutory language." Pet. App. 77a (quoting *Solem*, 465 U.S. at 470). It observed that Oklahoma invoked not "any particular statutory text," or any "'specific section'" indicating disestablishment, but instead "the overall thrust of" various statutes. Pet. App. 77a, 101a. The Tenth Circuit analyzed Oklahoma's statutes and found they "do not, individually or collectively, show" disestablishment. Pet. App. 107a.

The Tenth Circuit exhaustively considered the historical evidence addressing *Solem*'s second and third steps. But Oklahoma's "mixed" and "conflicting" evidence, the court found, "falls short." Pet. App. 109a, 121a.

Oklahoma did not dispute below (as it has not disputed here) that if the Creek reservation survives, Respondent's conviction cannot stand. Hence, the Tenth Circuit granted Respondent's habeas application. Pet. App. 132a-33a.

Today, Respondent remains on death row. Before prison, alcohol shaped his life. Both parents were alcoholics. His mother drank throughout her pregnancy, leaving Respondent with fetal alcohol syndrome, and then put beer in his bottles. The first time a welfare worker came to Respondent's home, his father was shooting at his mother, who was hiding in a ditch with the children. Respondent, too, became an alcoholic,

committing alcohol-related infractions. All paled, however, next to the crime for which Respondent is now incarcerated. After drinking to excess—the State counted 32 beers, Respondent testified to twice that, Trial Tr. at 1047-48—Respondent committed the murder for which he was sentenced to death.

Respondent's crime was undeniably grave. But in prison, Respondent has defeated his alcohol addiction. He has been a model prisoner, and he has been appointed a "run man"—a position of trust that allows him to help officials in the prison's day-to-day operation. Under the Tenth Circuit's decision, Respondent is subject to federal prosecution and life imprisonment without possibility of parole.

SUMMARY OF ARGUMENT

I. As in *Parker*, statutory text decides this case at *Solem*'s first and "most probative" step. In no relevant statute did Congress employ *Solem* and *Parker*'s "hallmark" disestablishment language—or, indeed, *any* clear language to that effect. The reason is not that such language was unsuitable for Creek lands or Oklahoma. Congress employed hallmark language to diminish Creek lands in 1832, 1856, and 1866, and it instructed the Dawes Commission to seek "cession" again. But instead, yielding to Creek demands, Congress retreated and enacted the very language that this Court has held is *insufficient* to diminish—allotment among citizens, plus sales of remaining land to non-Indians.

Oklahoma's tale about the "'overall thrust' of congressional action," Br. 52, cannot overcome the absence of clear text. Regardless, Oklahoma's

arguments are meritless. Oklahoma relies on allotment of Creek lands. But allotment is "completely consistent with continued reservation status." *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Oklahoma points to Congress's legislation to limit Creek "territorial sovereignty" and eventually dissolve the Creek government. But Congress expressly disavowed dissolution, leaving intact the Creek government and its sovereignty. Oklahoma insists that Congress regarded statehood and reservations as incompatible. But from the 1790s until today, statehood has coexisted with large Indian territories—and in the Enabling Act, Congress explicitly preserved the federal role over Indians and limited the new State's authority. And Oklahoma claims that Congress's express violation of some Creek treaty rights impliedly abrogated Creek rights entirely and disestablished their reservation. But the Allotment Agreement and the Enabling Act expressly preserve those rights.

II. The step-two evidence of surrounding circumstances confirms what the text shows. Far from pursuing a single-minded project from 1893 through 1906, Congress enacted legislation that reflected myriad reversals and hard-fought compromises among contending camps. The legislative history confirms that when Congress made the key choices that preserved the Creek reservation, it understood them as weighty. When the Dawes Commission reported that the Creek rejected "cession," Congress accepted allotment despite understanding that allotment was only half a loaf. When dissolution of the Creek government loomed, Congress legislated to save the Creek government, preserve the

Creek treaties, and prevent the Creek reservation from returning to the public domain, effectuating the pro-tribal view that it was "much better" to continue tribal governments "indefinitely and for all time." And when the question arose whether reservations were consistent with statehood, members answered that these rights could be "respected and protected" in the new State.

III. *Solem*'s third step is the least probative, and this Court "has never relied solely on [it] to find diminishment." *Parker*, 136 S. Ct. at 1081. Likewise here, the record is at worst mixed and cannot support disestablishment. Nor is "turmoil" a basis for disestablishment, as settled doctrines (some discussed in *Parker*) reveal the State's purported concerns to be vastly overblown. Because the State has conceded that Respondent must be retried if a reservation exists, the decision below must be affirmed.

ARGUMENT

I. Under *Solem*'s First And "Most Probative" Step, No Statute Disestablished The Creek Reservation.

Parker confirms that the disestablishment test is stringent and text-focused. "[O]nly Congress can" disestablish; "its intent ... must be clear"; and statutory text is the "most 'probative evidence'" of that intent. 136 S. Ct. at 1078-79 (quoting *Solem*, 465 U.S. at 470; *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Thus *Parker* "beg[a]n with the text" and, finding no diminishment, "conclu[ded] that Congress did not intend to diminish." *Id.* at 1079-80. *Parker* duly examined *Solem*'s two other

factors but was unwilling to let "mixed historical evidence ... overcome the lack of clear text[]." *Id.* at 1080. This case demands the same result.

A. *Solem*'s Text-Focused Test Protects Bedrock Principles.

Three principles guide *Solem*'s first step.

First, because only Congress can disestablish reservations, *United States v. Celestine*, 215 U.S. 278, 285 (1909); *see Parker*, 136 S. Ct. at 1078-79, congressional intent is paramount—and statutory text is the only unfailing evidence of Congress's intent. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Across substantive areas, the alpha and omega of statutory interpretation is the text. *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630-31 (2018); *Ratzlaf v. United States*, 510 U.S. 135, 146-48 (1994). As *Parker* confirms, this remains true in Indian reservation cases. 136 S. Ct. at 1079.

Second, the standard is especially demanding for sovereign rights. This rule, again, is not Indian-specific. *E.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (abrogation of immunity must be "unmistakably clear"); *see Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). But the rule applies to tribes, too. *Parker*, 136 S. Ct. at 1079; *see Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014). Appeals to "vague notions of ... 'basic purpose,'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993), cannot justify abrogating sovereign rights.

Third, Indian-specific principles reinforce these rules. Although a statute "may abrogate Indian treaty rights," Congress "must clearly express its intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). Likewise, statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). These principles confirm that the test is the text.

B. The Statutes Show Congress Did Not Disestablish The Creek Reservation.

The simple, dispositive, and undisputed point is that none of the relevant statutes, from 1890 through statehood, contain clear language of disestablishment.

While disestablishment does not require "magic words," Pet. App. 62a, neither does the Court conjure disestablishment from thin air. *Cf.* Br. 27 (Creek reservation "evaporated"). *Parker* surveys this Court's disestablishment cases and catalogs the textual "hallmarks" that embody Congress's intent to go beyond altering land title to "diminish reservation boundaries." 136 S. Ct. at 1079. Congress may provide an "[e]xplicit reference to cession" to the United States, or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Id.* Congress may "restor[e]" portions of a reservation to "the public domain." *Id.* Or Congress may use "other language evidencing the present and total surrender of all tribal interests," *id.*—providing, for example, that a reservation is "discontinued," "abolished," or "vacated." *Mattz*, 412

U.S. at 504 n.22; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962); *see, e.g.*, Act of July 27, 1868, ch. 248, 15 Stat. 221; Act of July 1, 1892, ch. 140, 27 Stat. 63 ("*Seymour* Act"); Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218. Similar formulations may suffice.

Here, there is nothing. There was no "cession" to the United States. The United States did not unconditionally commit to compensate the Creek for its lands. Never did Congress restore Creek lands to the public domain. And nowhere did Congress declare the Creek reservation discontinued, abolished, or terminated. Under *Solem*'s text-first test, this Court has never found diminishment or disestablishment unless some statute, treaty, or agreement spoke clearly to disestablish.[3]

For two reasons, moreover, the absence of disestablishment language is particularly telling.

First, Congress used the very language this Court has held is *insufficient* to disestablish. The 1901 agreement provided that "[a]ll lands of said tribe, except

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[3] Attribution is the farthest the Court has gone: When one agreement or statute contains express termination language, that text may establish a "baseline" applicable to related statutes. *See Rosebud*, 430 U.S. at 591-98 (1901 agreement and 1904 statute contained express cession language that was "precisely suited" to diminishment and informed 1907 and 1910 statutes); *Hagen*, 510 U.S. at 415 (express termination language "in the 1902 Act survived the passage of the 1905 Act"). While Oklahoma invokes *Rosebud* and *Hagen*, Br. 49, 50, 52, here *no* statute or agreement has express termination language.

as herein provided, shall be allotted among the citizens of the tribe by said commission." Allotment Agreement § 8. Not cession. Allotment among tribal members. And "allotment ... is completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497. Likewise, the "except" clause—referencing the 10,000 acres in town sites—merely authorized the Secretary "to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. "[S]uch provisions" do "no more than to open the way for non-Indian settlers to own land *on the reservation*." *Id.* (emphasis added). That rule reflects a bedrock principle: "[N]o matter what happens to the title of individual plots," once "a block of land is set aside for an Indian Reservation," it "retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470; *see Mattz*, 412 U.S. at 497 (similar).

Second, the absence of disestablishment language was no oversight. When Congress wanted to diminish Creek borders, it spoke clearly, using hallmark language. In 1832, the Creek "cede[d] to the United States all their land." 1832 Treaty art. I. In 1866, too, the Creek "cede[d] and convey[ed] to the United States ... the west half of their entire domain," and "in consideration of said cession," received $975,182. 1866 Treaty art. III; *see* 1856 Treaty art. I (Creek "hereby ... cede" land to Seminoles). Then, in 1893, Congress directed the Dawes Commission again to seek "cession" for an "agreed upon" "price." 1893 Act § 16. It speaks volumes that the statutes Congress actually passed lack such language. *Parker*, 136 S. Ct. at 1080 ("conclusion that Congress did not intend to diminish ... is confirmed by the text of earlier treaties").

It is no mystery why that happened. Although Congress desired "cession," the Creek "would not, under any circumstances, agree to cede any portion of their lands to the Government," and "insist[ed]" on "allotment" among citizens. J.A. 19. At the time, Congress believed it could not unilaterally terminate a reservation. *Parker*, 136 S. Ct. at 1081 n.1. So faced with Creek "unanimity," Congress "abandon[ed] all idea" of cession and focused on allotment. J.A. 19.

C. Oklahoma Is Wrong That The Textual Hallmarks Of *Solem* And *Parker* Are Unsuited To Oklahoma Or The Creek.

Unable to muster the language this Court deems essential, Oklahoma first suggests its failure is of no moment because this language was uniquely unsuited to the Five Tribes. Br. 48. But to begin, the just-recounted history shows otherwise. *Supra* at 25-26. Across seven decades from 1832 to 1901 and beyond, Congress's enactments foreclose any claim that the Creek and Oklahoma were "anomalies" unsuited for "cession" or *Parker*'s other hallmarks. Br. 46-49.

Oklahoma's specific arguments fare no better.

First, Oklahoma says the *Solem*/*Parker* hallmarks are inapposite because this case does not involve a "surplus land act." But that is no distinction. These statutes are from the same Allotment Era as prior cases, and Congress's motivations were similar. *Supra* at 7-9. Nothing about *Solem* is limited to a particular *type* of statute. *See Parker*, 136 S. Ct. at 1078-79 (*Solem* governs "whether an Indian reservation has been diminished").

Indeed, Oklahoma's whole conceit—a Platonic "surplus land act," which Congress abandoned in Indian Territory—is fiction. Congress's approach was "reservation-by-reservation," each "act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467. That said, if it *mattered* whether the statutes here fit the model of this Court's prior cases, the answer is yes. The 1901 agreement allotted lands among tribal members, but allowed non-Indians to purchase land in town sites. Then the Five Tribes Act provided that after allotments were complete, the Secretary could sell the remaining lands—ultimately, about 62,000 acres, or 2% of the Creek's 3 million, *see* Report of Dep't of Interior, 1911, vol. II, at 386 (1912), http://bit.ly/2xlyhBw—to non-Indians. FTA § 16.[4] Congress's name for those parcels? "[S]urplus lands." *Id.*

Any differences with this Court's prior cases favor the Creek. Sale of "surplus lands" to non-Indians affected only a sliver of Creek lands, leaving the rest in Indian hands. This is thus a far weaker disestablishment case than this Court's other cases, where the lands at issue overwhelmingly went to non-Indians. *E.g.*, *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427-28 (1975) (85% of land "sold to the United States"); *Yankton*, 522 U.S. at 338 ("unallotted lands"); *Hagen*, 510 U.S. at 404 (same); *Rosebud*, 430 U.S. at 602,

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[4] Congress first authorized sale of "residue" Creek lands in 1904, *see* Act of Apr. 21, 1904, 33 Stat. at 204, but repealed it in 1905, *see* Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1072. Here, as elsewhere, Congress's policies were full of reversals.

607 ("unallotted lands" and "except[ing] such portions" as were allotted).

Second, Oklahoma says the Creek did not have a "traditional" reservation, with land owned by the government in trust, but held "patents in fee simple." Br. 21, 23. But again, that cuts against the State.

The fee-simple patent gave the Creek more protection, not less. Where most tribes held rights of occupancy based only on a treaty (or executive order), the Creek won—after broken treaty promises triggered the Trail of Tears—both treaty guarantees and a patent. The patent, which issued decades later, did not take away the Creek's independent treaty protections. 1832 Treaty art. XIV ("Creek country ... shall be solemnly guaranteed"); 1833 Treaty art. II ("Creek country ... shall be embraced within the following boundaries"); 1856 Treaty art. II ("The following shall constitute and remain the boundaries of the Creek country"); *id.* art. XV ("Creeks ... shall be secured ... within their respective limits"); 1866 Treaty art. III ("Creek lands ... shall ... be forever set apart as a home"). So again, *Solem*'s directive to seek disestablishment *in the text* applies with full force.

Nor does it matter whether Creek territory was called a "reservation." Br. 23-25. *If* that question mattered, Oklahoma's argument would be waived. *See* Pet. App. 109a ("State 'does not dispute that the reservation was intact in 1900'" (quoting Okla Br. 75 n.25)). Regardless, Creek territory was a "reservation" in every relevant sense. To create an "Indian reservation," it "is enough that" a "defined tract [is] appropriated to ... Indian occupation." *Minnesota v.*

Hitchcock, 185 U.S. 373, 390 (1902); *see Cohen's* § 3.04 at 190-91 (reservation is "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin").

Congress reserved the Creek territory from the federal public domain *by conveying title*. Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411 (authorizing President to convey "territory belonging to the United States, west of the Mississippi" to Indians in "exchange [for] lands where they now reside"). That is why Congress's 1866 treaty identified the Creek's remaining lands as a "reduced Creek reservation." 1866 Treaty art. IX. And it is why this Court and Congress repeatedly referred to Five Tribes lands as "reservations." *E.g.*, *Atl. & Pac. R.R. Co. v. Mingus*, 165 U.S. 413, 435, 440 (1897) ("no doubt" that statute applicable to "reserved" lands applied to Indian Territory "reservations"); Treaty between United States and Cherokee Nation, July 19, 1866, art. IV, 14 Stat. 799 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 646 (same); *see also Maxey v. Wright*, 54 S.W. 807, 810 (Ct. App. Ind. Terr. 1900) ("contention that the Creek Nation is not now an Indian reservation is not tenable").

D. The "Overall Thrust Of Congressional Action" Did Not Disestablish The Creek Reservation.

Swapping story for text, Oklahoma asks the Court to examine at step one the "'overall thrust' of congressional action." Br. 52. It contends that Congress (1) "dissolve[d] the Five Tribes' communal land tenure" and (2) "repudiate[d] ... the United States' treaty promises of tribal self-rule" to (3) achieve statehood, which

Congress supposedly viewed as incompatible with the Creek's treaty-guaranteed reservation. Br. 8, 10. And by breaking individual treaty promises, Oklahoma says, Congress entirely abrogated the treaties with the Creek and implicitly disestablished the reservation.

This appeal to Congress's "overall thrust" is a long way from *Solem* and *Parker*—the distance, in fact, from textualism to purposivism. Regardless, Oklahoma's story is false—in each chapter, and in its overall suggestion that Congress's actions between 1893 and 1906 reflected a single-minded effort. Congress was divided; its legislation reflected that. *Supra* at 7-8, 11-13. So yes, statehood was a substantial settler victory. But tribes and their congressional allies won victories too—among others, allotment over cession, the Five Tribes Act's preservation of tribal governments and protection for tribal land, and the Enabling Act's guarantee of continuing federal guardianship over Indians. *Supra* at 9-13. Those compromises illustrate why here, as elsewhere, it is critical to respect the actual text Congress enacted, not self-serving readings of the "overall thrust" of congressional action.

1. Ending Communal Tenure Via Allotment Does Not Support Disestablishment.

Oklahoma's story about land, Br. 4, 19, 26-28, is misdirection. Merely eliminating communal tenure never diminishes or disestablishes. *Supra* at 24-25. The question is one of congressional means. The means Congress used to end Creek communal tenure powerfully shows not disestablishment, but its opposite. Congress directed Indian lands into Indian hands,

allotting it among citizens. *Id.* Such changes, being "completely consistent with continued reservation status," do not disestablish. *Mattz*, 412 U.S. at 497. Meanwhile, when Congress directed modest tracts into non-Creek hands, it did not use disestablishment language. It merely allowed "non-Indian settlers to own land on the reservation." *Solem*, 465 U.S. at 473.

Oklahoma urges that Congress viewed allotment and cession as equivalent, so a decision to allot "achieve[d] the same result as cession." Br. 48. But a century of law refutes that claim. *Mattz*, 412 U.S. at 497; *Celestine*, 215 U.S. at 285-86. *Solem*'s whole point is that allotment does not effect disestablishment or have the same result as cession. 465 U.S. at 470. Indeed, the Dawes Commission *told Congress* that allotment and cession were different, J.A. 27-28, and in the real world, the two demonstrably were not "alternative means to the same end." Land ceded by the tribes or restored to the public domain was alienable and subject to state taxation; land allotted to the Creek that remained in Creek hands was *inalienable* and *immune* from taxation. Nobody at the time—not Congress, the State, or Tribes—believed Oklahoma's false equivalence.

Nor is there anything to Oklahoma's suggestion that "cession" did not fit Congress's goals. Br. 48-49; *cf.* U.S. Br. 24. If Congress wanted (as Oklahoma suggests) to allot land among members while terminating the reservation, it had a model: The 1892 statute in *Seymour* "vacated and restored" a reservation section "to the public domain," then provided for "allot[ments] to each Indian." *Seymour* Act §§ 1, 4; *see Seymour*, 368 U.S. at 354. When the Dawes Commission told Congress that

"cession" would have "immeasurably simplified" matters, J.A. 27-28, it described that model: The Creek would "ce[de] ... the entire territory," from which the government would return to Creek citizens "a stipulated amount" plus "cash." J.A. 27. Congress had this model at hand; acceding to Creek resistance, Congress chose not to use it.

2. Congress Preserved The Creek Government And Its Territorial Jurisdiction.

Congress's 1901 legislation to dissolve the Creek government, invoked by Oklahoma, puts into sharp relief that Oklahoma's claims lack merit.

True, dissolution would have been fateful: The Creek held their reservation "so long as they shall exist as a nation." 1833 Treaty art. III. But recognizing the stakes, Congress deferred dissolution for five years, making it "subject to such further legislation as Congress may deem proper." Allotment Agreement § 46. Then, Congress reversed course. The Five Tribes Act's Section 28 "continue[d] in full force and effect for all purposes authorized by law" the Creek's "tribal existence and present tribal government[]." Thus, at a time when Congress's assimilationist faction continued to believe tribes and their governments would (and should) disappear, *Solem*, 465 U.S. at 466, Congress legislated to preserve the Creek.

Oklahoma insists that even though the Creek government endured, its "territorial sovereignty" did not. Br. 28. But first, the treaties pegged the reservation to the Creeks' "exist[ence] as a nation," 1833

Treaty art. III, not any particular government powers. Regardless, the statutes continued the Creek's territorial jurisdiction. The 1901 Agreement recognized the Nation's jurisdiction over "lands of the tribe, or of individuals after allotment," which would remain subject to the Nation's "act[s], ordinance[s], or resolution[s]," provided the President approved. Allotment Agreement § 42. And when the Five Tribes Act continued the Creek's "present tribal government[]" "for all purposes authorized by law," FTA § 28, it preserved this jurisdiction.

Oklahoma is not the first to argue that, by limiting government powers, Congress abolished the Five Tribes' reservations and territorial sovereignty. In *Morris v. Hitchcock*, non-Indians claimed that the Chickasaw Nation lacked power to impose a "license fee or tax" within its borders, relying—like Oklahoma—on allotment and the Curtis Act's steps to pressure agreement to allotment: "abolish[ing] ... tribal courts" and "den[ying]" tribal laws "enforcement in [federal] courts." 21 App. D.C. at 568, 593. The D.C. Circuit, however, explained that the tribe retained its "expressly continued legislative power," which federal officials could enforce. *Id.* at 598. This Court affirmed, emphasizing that the tribe's territorial jurisdiction remained intact even where allotment placed "absolute owner[ship]" of land outside the tribe. *Hitchcock*, 194 U.S. at 389, 392-93. The Eighth Circuit applied *Hitchcock* to the Creek, upholding the "authority of the Creek" to govern "within its borders" and explaining the tribe retained "every governmental power ... of which it

has not been deprived," including over land owned by non-Indians in fee. *Buster*, 135 F. at 953, 958.

This Court "presume[s] Congress [i]s aware of ... the state of the law" when it legislates. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259 (2009). And after these decisions holding that the Five Tribes' jurisdiction endured, the only reading of the Five Tribes Act is that it preserved Creek territorial sovereignty. While Oklahoma observes that the Act "abolish[ed]" "taxes accruing under tribal laws" after 1905, FTA § 11; *see* Br. 35, there is more to government than taxes. If anything, by singling out taxes, Congress confirmed that other powers continued. "[U]nless and until Congress withdraws a tribal power ... the Indian community retains that authority." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

Downplaying Congress's choice, Oklahoma observes that Congress had specific "practical" purposes in extending the Creek government, such as "sign[ing] deeds" or avoiding "transfer of land to railroad companies [via] contingent land grants." Br. 36. But what matters is that Congress acted, not whether Oklahoma deems Congress's reasons worthy of respect. Congress's reasons, moreover, underscore that it deliberated carefully. In particular, the railroad debates show that Congress focused on the need to preserve the Creek government *precisely* to prevent land from returning to the public domain. *Supra* at 11-12; *infra* at 42-43. That is, Congress acted to thwart the very result Oklahoma claims Congress's actions accomplished.

Nor is Oklahoma correct that Congress did the bare minimum to achieve its "practical" ends. On March 2,

1906, Congress enacted legislation preserving tribal governments "until all property of such tribes, or the proceeds thereof, shall be distributed." S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906). Were Congress interested only in preserving "wind-up authority," that was enough. But Congress shortly thereafter preserved the Five Tribes *indefinitely*.

The limits imposed on the Creek government do not help Oklahoma. Br. 29. Many predate the Five Tribes Act and *Hitchcock* and *Buster*'s holdings that territorial jurisdiction endured. *Compare* Br. 29 ("presidential approval" for legislation), *with* Allotment Agreement § 42 (same), *and* Br. 29 (limit on "ability to determine ... membership"), *with* Act of June 10, 1896, ch. 398, 29 Stat. 321, 339 (similar). And while Oklahoma claims Congress's 1901 grant of U.S. citizenship reflected "dismantling of tribal government," Br. 30, "citizenship is [not] inconsistent with" reservation status. *Celestine*, 215 U.S. at 287. Nationwide, *all* Indians who received allotments received citizenship. Br. 30.

Doubtless, the Creek government found its powers limited and suffered countless indignities—many from the BIA's "bureaucratic imperialism," *supra* at 13, but some from Congress. That, however, is not the same as abolishing the Creek reservation. When Congress legislates to leave the "pilot light" on, Br. 36, this Court may not snuff it out.

3. Statehood Did Not Disestablish The Creek Reservation.

Also wrong is the claim that Congress viewed statehood and Indian lands as incompatible, so

"disestablish[ing] the Creek borders [w]as a necessary step [for] Oklahoma statehood." Br. 21.

To begin, at statehood more than three-quarters of Five Tribes' lands—16 million acres—remained inalienable, largely in restricted allotments. *Supra* at 13. State jurisdiction over such lands is limited, as Oklahoma concedes. Br. 45; *supra* at 15; *infra* at 47. So the result Oklahoma depicts as inconceivable—nearly "half" the "new State" being "Indian country," Br. 23—is the result Congress *legislated* in the Enabling Act even on Oklahoma's theory.[5]

Founding-era Congresses agreed that broad areas of Indian jurisdiction are compatible with statehood. In 1796, Congress admitted Tennessee on "equal footing" as the first territory to become a State. Act of June 1, 1796, ch. 47, 1 Stat. 491, 491-92. Yet *three-quarters* was Indian country, guaranteed to the Chickasaw and Cherokee Nations. Treaty with the Cherokee, art. IV, July 2, 1791, 7 Stat. 39; Treaty with the Chickasaw, art. III, Jan. 10, 1786, 7 Stat. 24, 24-25. Congress debated whether it should exclude that territory. 1 Annals of Cong. 1312. But Congress admitted the whole State, including land beyond Tennessee's "ordinary jurisdiction." Act of May 19, 1796, ch. 30, § 19, 1 Stat. 469.

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[5] While Congress lifted some restrictions in 1908, Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, what matters is that Congress did not view those restrictions, and the jurisdictional limits they imposed, as incompatible with statehood. *See* S. Rep. No. 60-575, at 1 (1908) (noting that 1908 legislation leaves "about half of the lands of eastern Oklahoma nonalienable and nontaxable").

There thus is nothing to Oklahoma's claim that Congress disestablished the Creek reservation by admitting Oklahoma on "equal footing." Enabling Act § 4; *see* Br. 22. Today, *every* reservation is within at least one State. And many reservations existed before statehood and continued after, including those in *Seymour*, 368 U.S. at 354, *DeCoteau*, 420 U.S. at 427, *Rosebud*, 430 U.S. at 586, *Solem*, 465 U.S. at 465, *Hagen*, 510 U.S. at 402-03, *Yankton*, 522 U.S. at 333, and *Parker*, 136 S. Ct. at 1077-78. Oklahoma wants not "equal footing," Br. 22, but special treatment.

Mille Lacs rejected much the same argument. Minnesota argued that Indian treaty "rights"—there, hunting and fishing rights—were "irreconcilable" with statehood and thus were "extinguished" when Congress admitted Minnesota on "equal footing." 526 U.S. at 202. But this argument "rest[ed] on a false premise." *Id.* These "treaty rights ... [we]re not irreconcilable with a State's sovereignty," as was clear from the many instances in which such rights *in fact* coexisted with state authority. *Id.* So statehood was "insufficient to extinguish" them. *Id.* at 205. Likewise here, States and reservations coexist everywhere.

Indeed, the Enabling Act expressly confirmed that statehood did not divest tribal rights. Congress mandated that the new constitution could not "limit or impair the rights of person or property pertaining to the Indians of said Territories" or "limit or affect the authority of the [federal] Government ... to make any law or regulation respecting such Indians, their lands, property, or other rights." Enabling Act § 1. Congress also required the State to "disclaim all right and title ...

to all lands ... owned or held by any Indian, tribe, or nation." *Id.* § 3. As this Court summarized, such provisions reaffirmed the United States' "control ... of the large Indian reservations and Indian population of the new State." *Coyle*, 221 U.S. at 570.

4. Congress Did Not Disestablish The Creek Reservation By Supposedly Breaking Other Promises.

None of the actions invoked by Oklahoma—concerning "communal ownership," "territorial sovereignty," or "statehood"—thus indicate disestablishment. Nonetheless, Oklahoma argues that because these actions supposedly broke "treaty promise[s]" in some respects, Congress eliminated *all* the Creek's treaty-based rights and thereby disestablished its reservation. Br. 27.

To start, Oklahoma's premise is questionable: The Creek *agreed* to much of what Oklahoma depicts as promise-breaking, including ending communal ownership. Allotment Agreement §§ 2-3, 47. Regardless, history shows that when Congress adjusted Creek treaty rights, it was not coy. While Congress legislated many changes to Creek land and government, it did not legislate disestablishment. And by violating a treaty—even repeatedly—a party does not dissolve the treaty or the other party's remaining rights. *See Restatement (Second) of Foreign Relations Law of the United States* § 158(1)(c) (1965); *see Restatement (Second) of Contracts* § 241 (1981). Here, moreover, the Allotment Agreement and Enabling Act *protected* Indian treaty rights. *Supra* at 10, 13, 37-38. Any

individual treaty violations thus left the Creek's remaining treaty rights, including their treaty-protected reservation, undisturbed.[6]

II. The Step-Two Evidence Confirms That Congress Did Not Disestablish The Creek Reservation.

At step two, "unequivocal evidence" from "surrounding circumstances" "may support" diminishment. *Yankton*, 522 U.S. at 351. But this Court has never relied on such evidence unless it "perceive[d] ... intent to diminish ... in the plain statutory language." *Id.* *Parker* confirms that "mixed historical evidence" does not advance the ball. 136 S. Ct. at 1080.

Moreover, not all "historical context," Br. 51, is equal. "More illuminating" is negotiating history. *Parker*, 136 S. Ct. at 1081 (quoting *Solem*, 465 U.S. at 471). Less so are "dueling remarks by individual legislators." *Id.* Less relevant still are Oklahoma's secondary sources—untested, and of dubious probity—(mis)characterizing the history.

A. The Most Probative Step-Two Evidence Confirms What Statutory Text Shows.

Oklahoma uses pop historians to draw history as a straight line: Congress "proceeded with [a] singular purpose," accomplishing by 1906 goals it set in 1893 and carried through in between. Br. 26. The real story,

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[6] *Yankton* found diminishment despite a "savings clause" only because the statute contained hallmark "cession" language. 522 U.S. at 344. *Yankton* would not "read the saving clause in a manner that eviscerates" this hallmark language. *Id.* at 346.

however, is about reversals. Having aimed at reservation-diminishing "cession," Congress retreated. Having legislated to dissolve Creek government, Congress saved it. And while granting statehood, Congress enacted important protections over Indian lands. The step-two evidence confirms that Congress understood each reversal as weighty.

Respondent has described how Congress confronted whether the Creek agreement would include disestablishment language—Congress's directive to the Dawes Commission to seek "cession"; the Creek's refusal; and Congress's acquiescence. *Supra* at 8-10, 25-26. Congress, moreover, understood that its retreat *mattered*. The Commission starkly conveyed the point, observing that, while "cession" would have "immeasurably simplified" matters, Congress should accept allotment because tribal resistance made "a more radical scheme of tribal extinguishment" "impossible." J.A. 27-28; *see Mattz*, 412 U.S. at 504 (when Congress considered but did not enact "bills [that] expressly provided for ... termination," Court will not infer "intent to terminate").

Congress took this bargain because it could achieve important goals without cession. Congress aspired to create a new State but did not believe statehood required disestablishment. Members observed that "these reservations" have been "guaranteed ... by treaty stipulations" and that

> I do not know why the rights which have been given to them under the treaties ... might not be respected and protected, and yet have them brought into the Union as a State.

24 Cong. Rec. at 268 (Sen. Perkins).

Congress *was* worried about communal land tenure, but addressing it did not require cession. *Woodward* canvassed the legislative history—a dozen Commission reports and myriad committee reports. 238 U.S. at 296 n.1, 299 n.2. What drove Congress, this Court found, was the view that "'under treaty provisions'" tribal lands "'were to be held for the use and benefit of [tribal] members,'" yet a few individuals had "appropriate[d] to their exclusive use" the best lands. *Id.* at 297, 299 n.2 (quoting H.R. Rep. 55-593 (1898)). In forcing changes to Creek land tenure, Congress's "manifest purpose" thus was to implement "the true intent and meaning of the early treaties." *Id.* at 306; *see id.* at 299 n.2 (similar). Allotment (without cession) fulfilled that goal, ensuring each Creek received a fair share. Doubtless, it also addressed settlers' demands for "freely alienable individual title," as allotments would *eventually* become alienable. Pet. App. 67a. What matters, however, is that none of Congress's goals—altruistic, or base—demanded disestablishment.

Having discarded cession, Congress maintained that its goals did not require "abrogat[ing] its treaty promises." Br. 27. In 1895, Senator Dawes "assure[d]" the Five Tribes that the federal government did not "undertake to deprive any of your people of their just rights," but to "secur[e] ... their just rights under the treat[ies]." J.A. 23. And thereafter, members of Congress maintained that their actions were consistent with treaty obligations, modifying them only with Creek consent. *Statehood for Oklahoma: Hearing Before the H. Comm. on the Territories*, 58th Cong. 137 (1904)

(*Statehood Hearing*) (Mr. Havens) (disputing "that the Congress has ever violated its treaties"); *id.* at 139 (same); *see* 29 Cong. Rec. 2341 (1897) (Sen. Platt) ("Men of great legal ability who have gone into it ... do not believe ... there is any violation of any treaty"). Oklahoma's view that "Congress expressly repudiated every [treaty] promise," Br. 21, was not Congress's.[7]

True, members understood that *one* enactment—dissolving the Creek government—could be fateful. The treaties tied rights to the Creek's continued existence. *See* 29 Cong. Rec. 2305 (Sen. Vest) (treaties "gave to those Indians the occupation of this Territory ... so long as they maintained their tribal relations and continued to live there"); *Statehood Hearing* 98 (Mr. Howe) (equating "abolition of tribal government" with "abrogation of all the former treaties"); *id.* at 144 (Mr. Havens) ("treaty is still in effect" "until that time" as "tribal relations shall cease"). Indeed, members believed that the "moment the tribe ceases to exist," the federal government would "have no further control over the property of those Indians," which would "be controlled by the new State." 40 Cong. Rec. 2977 (Sen. McCumber).

That is the result Oklahoma claims Congress intended—yet Congress acted to *avoid* it. Concerns that dissolution might trigger contingent land grants held by railroads, or abruptly close tribal schools, focused Congress's attention. 40 Cong. Rec. 3053 (Sen. Aldrich);

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[7] Oklahoma can cite members holding different perspectives, but that is why this Court discounts "cherry-picked statements by individual legislators." *Parker*, 136 S. Ct. at 1081.

see also id. at 3052 (Sen. Spooner) (urging prompt legislative action). After careful consideration, Congress reversed the 1901 agreement, concluding that there "is not any necessity ... for ... dissolution." *Id.* at 3122 (Sen. Teller). And when it did so, Congress understood that it was doing more than just resolving the important crises of the day, but was instead "continu[ing] ... all ... matters connected with" tribal governments. *Id.* at 3054 (Sen. Clark); *see also id.* at 3122 (Sen. Teller) ("better indefinitely and for all time to continue" tribal governments); *id.* at 3061 (Sen. Teller) (similar).

B. Oklahoma's Evidence Is Unpersuasive.

"[M]ixed historical evidence" never supports disestablishment, *Parker*, 136 S. Ct. at 1080, but even on its own terms, Oklahoma's evidence is unpersuasive.

Naturally, Oklahoma can stitch together quotations full of hostility to the Creek and anticipating the tribe's disappearance. Everywhere, Congress's assimilationist faction "anticipated the imminent demise of the reservation." *Solem*, 465 U.S. at 468-69. And Congress had legislated in 1901 to dissolve the Creek government. So *of course* people contemplated "civil death of the Muscogee Nation." Br. 50 (quoting S. Doc. 54-111); *see also* Br. 9 (Sec'y Smith letter, Isparhecher statement); Br. 30 (Sen. Pettigrew, Mr. Howe statements); Br. 37 (Cherokee attorney statement). But history proved wrong those who believed reservations were relics of the past, and Congress reversed course to preserve the Creek government. The Court cannot "extrapolate" disestablishment from "expectation[s]," *Solem*, 465 U.S. at 468, that went unrealized.

Oklahoma's remaining evidence illustrates why legislative history earns its bad name. Many statements come from the 1890s—irrelevant because, as all agree, the Creek reservation endured into the 20th century. *Supra* at 28; *see* Br. 9, 10, 12, 20, 27, 30, 50. Other statements concern measures that plainly *did not* disestablish—like statehood, Br. 27 (Rep. Beall statement), U.S. citizenship, Br. 12, 30-31 (discussing H.R. Rep. 56-1188), or abolition of tribal courts, Br. 30 (Sen. Vilas statement); *id.* (Pleasant Porter statement). Of Oklahoma's most colorful statements, many come from *opponents* of Congress's policies, especially Senator Bate. Br. 20, 30 (twice), 52. Theirs would not be the first dissents to inflate results they opposed.[8]

C. Criminal Jurisdiction Does Not Suggest Disestablishment.

Oklahoma also asks the Court to infer from post-statehood criminal jurisdiction that Congress did not understand Creek lands to remain a reservation. First, it says "Congress ... directed" Indian criminal cases to state courts, which Oklahoma claims is inconsistent with reservation status. Br. 39. Second, Oklahoma contends the new State "actually" exercised such jurisdiction, supposedly reflecting Congress's intent. *Id.* Third, Oklahoma claims that if a reservation endured, a

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[8] Sometimes, Oklahoma resorts to pure omission. For example, it quotes a chief's statement that he had "hardly any[]" authority besides signing deeds—omitting his caveat that "I can call my council together; my council can come together and pass such laws as they think fit these people should have," provided they received "the approval of the President." S. Rep. No. 59-5013, pt. 1, at 885 (1907).

"jurisdictional gap" would have existed. Br. 43-44. But again, Oklahoma errs at each step. Its musings do not compensate for the absence of clear diminishment language.

1. Congress did not send crimes involving Indians on reservations to state court. Post-statehood, the Major Crimes Act applied to "reservations" in "any State" and directed crimes to federal court. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. It applied in Oklahoma, like everywhere else. The Enabling Act did not "direct[] a different course," Br. 39, as it applied only to "causes pending" at statehood, not *new* cases. Enabling Act § 16.

Nor did the Enabling Act send pending, pre-statehood cases elsewhere. It transferred to *federal* court cases "arising under the Constitution, laws, or treaties of the United States," including criminal cases. *Id.* Major Crimes Act crimes are such cases. So are crimes under the General Crimes Act, which "extend[s] to the Indian country" the "general laws of the United States" for federal enclaves. Rev. Stat. § 2145. So, too, were the laws of Mansfield's Digest of Arkansas law that Congress had applied to Indian Territory Indians as "incorporated" federal law, *Indian Country*, 829 F.2d at 978; *see* Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.[9] And to be double-clear, Congress in 1907 amended the Enabling Act to confirm the transfer to federal courts of "[p]rosecutions for all crimes and offenses ... pending ...

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[9] Where general federal and Arkansas law defined the same offense, federal definitions "govern[ed]." Act of May 2, 1890, ch. 182, § 33, 26 Stat. 81.

upon ... admission ... which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286, 1287. Congress did not give Oklahoma uniquely broad jurisdiction. *See S. Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) (state courts' jurisdiction "was to be the same [as if] the Indian Territory been a State when the offenses were committed").

2. Noting that Oklahoma prosecuted Indian crimes, wherever committed, the State asserts that disestablishment is "the only way to reconcile what actually transpired with criminal jurisdiction at statehood." Br. 39. History refutes that claim. Nationwide, on intact reservations, States often exercised jurisdiction that Congress had not conferred. Kansas for decades exercised "jurisdiction over all offenses committed on Indian reservations." *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993). So did Nebraska. Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe*, 1945-1995, 15-17 (1999) (Nebraska "erroneously exercis[ed] criminal jurisdiction ... for some seventy years"). And Washington and South Dakota did the same on the *Seymour* and *Solem* reservations. *E.g.*, *State ex rel. Best v. Super. Ct. for Okanogan Cty.*, 181 P. 688, 689 (Wash. 1919); *United States v. La Plant*, 200 F. 92, 94 (D.S.D. 1911); *State v. Sauter*, 205 N.W. 25, 28 (S.D. 1925); *Lafferty v. State ex rel. Jameson*, 125 N.W.2d 171, 174 (S.D. 1963); *State v. Barnes*, 137 N.W.2d 683, 684 (S.D. 1965).

Nowhere are such prosecutions less revealing than Oklahoma. One reason is its lawless treatment of Indians generally—the post-statehood "orgy of plunder

and exploitation," in which state and federal officials together plundered Creek citizens and lands. *Waters Run* 91. But the more important reason is that as to jurisdiction specifically, Oklahoma undisputedly overstepped. Recall that 16 million acres, or three-quarters of eastern Oklahoma, remained in Indian hands in 1907, and Oklahoma today *concedes* it lacks jurisdiction over Indian crimes on such lands. Br. 45; *see Klindt*, 782 P.2d at 404. That means Oklahoma's "iceberg" of prosecutions, Br. 40, was overwhelmingly *unlawful*, as one of the Solicitor General's cases shows. *McGlassen v. State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913) (crime on "allotment"); U.S. Br. 30.[10]

3. Nor is there anything to Oklahoma's purported "jurisdictional gap." The State's argument goes something like this. Congress had dissolved tribal courts, and the federal government generally lacks authority to prosecute minor Indian-on-Indian crimes. Thus, if the Creek reservation endured and the new State lacked jurisdiction over such crimes, no court would have had such jurisdiction. That "jurisdictional gap," Oklahoma contends, reveals that Congress must have believed that the reservation was disestablished. Br. 43-44. But even assuming that an implicit "belief" of Congress could disestablish, Oklahoma's argument dissolves on inspection.

To start, Congress's statutes did not dictate a "jurisdictional gap." True, the General Crimes Act *normally* did not provide federal authority to prosecute

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[10] *Hendrix v. United States*, 219 U.S. 79 (1911), did not discuss, much less decide, reservation issues.

non-major "crimes committed by one Indian against ... another." Rev. Stat. § 2146. But in Indian Territory, Congress rendered "the laws of the United States" and the "incorporated" Arkansas law, *Indian Country*, 829 F.2d at 978, applicable to Indians "irrespective of race," Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. Congress thus reached minor and major crimes with federal law—what one would expect with Congress poised to eliminate the tribal courts that normally handle minor crimes. And while statehood ended general federal criminal authority over non-Indians, *United States v. Ramsey*, 271 U.S. 467, 469 (1926), it endured in Indian cases. The Enabling Act preserved federal authority "to make any law or regulations respecting ... Indians [or] their lands." Enabling Act § 1. This Court interpreted that section to preserve not just forward-looking power, but "established [federal] laws and regulations" concerning Indians. *Ex parte Webb*, 225 U.S. 663, 683 (1912); *see Ramsey*, 271 U.S. at 469 (federal "authority in respect of crimes committed by or against Indians continued ... as it was before").

In any event, any jurisdictional gaps show nothing about Congress's views. For one thing, Oklahoma's theory likewise has a jurisdictional gap: Oklahoma concedes (as its courts have held) that its state courts lacked jurisdiction over crimes committed on restricted allotments. The existence *vel non* of a jurisdictional gap thus says nothing about what Congress thought of the Creek reservation.

Moreover, tribal courts nationwide were often absent or ineffective, yielding the same "gap." That is why, in 1883, the BIA began establishing by regulation

"Courts of Indian Offenses": The Major Crimes Act did not "reach [many] crimes or offenses," and thus reservations "without ... a court" "would be without law or order." Report of Secretary of Interior, 1885, vol. II, at 21 (1885) (U.S. Ser. Set vol. 2379); *see Colliflower v. Garland*, 342 F.2d 369, 372 (9th Cir. 1965); *Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991). These BIA courts could "try and punish any Indian ... for any misdemeanor ..., as defined in the laws of the State or Territory within which the reservation may be located." H.R. Exec. Doc. No. 1, part 5, vol. II, 52d Cong., 2d Sess., at 30.[11] While the BIA's regulations excluded tribes with functioning judicial systems (as the Five Tribes had when those regulations were promulgated), a pen stroke could change that. *E.g., Law and Order on Indian Reservations*, 44 Fed. Reg. 37,502 (1979) (BIA's establishment of courts after Oklahoma's courts rejected State's unlawful exercises of jurisdiction in western Oklahoma). So a jurisdictional gap for minor crimes would have been neither a novel nor a practical problem.

With Indian jurisdiction, practical problems have always been Congress's focus. For example, only when Kansas's authority "was called into question" did Congress address the quandary from its unlawful prosecutions. *Negonsott*, 507 U.S. at 106-07. Likewise, *Duro v. Reina*, 495 U.S. 676 (1990), found that a jurisdictional gap had existed for a century—because tribal, federal, and state courts all lacked jurisdiction over non-major crimes by nonmember Indians. *Id.* at

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[11] Oklahoma is thus wrong that these courts *only* addressed practices "considered 'heathen.'" Okla. Cert. Reply 10-11.

697; *see id.* at 704-05 (Brennan, J., dissenting). Congress fixed the problem when it arose. H.R. Rep. No. 102-61, at 3-4 (1991).

That said, the Court need not decide how best to read these jurisdictional tea leaves. Disestablishment requires that Congress speak "clearly." *Solem*, 465 U.S. at 470. Given the absence of hallmark or other direct disestablishment language, Oklahoma's self-serving claims of what Congress must have believed cannot provide the textual clarity that *Solem* and *Parker* demand.

III. Step-Three Evidence Does Not Show Clear Congressional Intent To Disestablish.

Oklahoma relies heavily on post-statehood events. Br. 37-38, 39-43, 44-45, 52-56. But this Court "has never relied solely on this third consideration to find diminishment." *Parker*, 136 S. Ct. at 1081. For good reason. Post-enactment history is a poor indicator of congressional intent—generally, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), and in diminishment cases, *Solem*, 465 U.S. at 472 n.13; *Yankton*, 522 U.S. at 355; *Hagen*, 510 U.S. at 420. Equivocal post-enactment history cannot substitute for textual clarity.

A. Probative Step-Three Evidence Indicates Congress Did Not Disestablish.

After the Enabling Act, Congress repeatedly recognized the Creek reservation's borders. It did so in 1906 (confirming "the west boundary line of the Creek Nation," Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364);

1909 (appropriating funds for "equalization of allotments in the Creek Nation," Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805), and 1918 (appropriating funds for "schools in the ... Creek ... Nation[]," Act of May 25, 1918, ch. 86, 40 Stat. 561, 581).

While Oklahoma claims these references were merely "historic signifier[s]" that lacked legal significance, Br. 33-34, Congress saw things differently. In 1924, Congress established mining rules for "Indian reservations other than lands of the Five Civilized Tribes"—underscoring that, absent the exclusion, "reservations" would encompass Five Tribes' land. Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (codified at 25 U.S.C. § 398). The 1936 Oklahoma Indian Welfare Act authorized the Secretary to acquire lands in Oklahoma "within or without existing Indian reservations," Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501),[12] and authorized restoration of many government powers Congress had restricted, *id.* § 3. Congress thus recognized both that tribal boundaries endured and that governments remained intact to exercise power over them.[13]

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[12] The statute thus rejected the view of the Senate Report, submitted by Oklahoma's senator, opining that "all Indian reservations as such have ceased to exist." Br. 55.

[13] When Congress elsewhere defined "reservations" to include "former Indian reservations in Oklahoma," 25 U.S.C. § 1452(d), it merely recognized *some* Oklahoma reservations were disestablished. *E.g.*, *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965). Regardless, the *Solem* reservation remained intact even though Congress called it a "former" reservation. 465 U.S. at 479.

Executive-branch officials maintained the oversight of Creek lands that accords with a reservation. After statehood, federal officials retained "control and direction of the schools among the Five Civilized Tribes," approved mineral leases, and "collect[ed] the taxes and royalties belonging to the several tribes." J.A. 46, 51, 60-61.

Although no friend of the Five Tribes, the Interior Department recognized the Creek reservation endured. Through 1918, its "Maps Showing Indian Reservations" continued to show the Creek. J.A.79-117. Indeed, those maps paint *the same* understanding of Oklahoma's geography—the east, covered by reservations—Oklahoma says "cannot be right." Br. 2. Likewise, the BIA "consistently included the Creek Nation in tables summarizing reservation statistics." Pet. App. 123a; *see* Creek Nation 10th Cir. Merits Br., App. B. Oklahoma emphasizes that these statistics quantified "unallotted" lands, Br. 55—but that is only because that metric was important to the agency charged with allotting lands. These tables cannot be squared with Oklahoma's view that the Creek reservation vanished "by ... statehood." Br. 4; *see* Report of Dep't of Interior, 1913, vol. II, at 42 (1914) (reporting oil production from "new ... field, located within the Creek Reservation"), http://bit.ly/2xkncAu.

Courts reached the same result. *United States Express Co. v. Friedman*, 191 F. 673, 678 (8th Cir. 1911) (rejecting argument that former Indian Territory land "ceased to be Indian country upon" statehood); *see United States v. Wright*, 229 U.S. 226, 226, 236 (1913)

(former Indian Territory, including "county of Muskogee," remained "Indian country").[14]

B. Oklahoma's Other Post-Enactment Evidence Sheds Little Light On Congress's Intent.

A "mixed record" "cannot overcome the statutory text," *Parker*, 136 S. Ct. at 1082, and Oklahoma's step-three evidence has little probative value anyway.

1. Oklahoma claims Congress's actions lifting restrictions, giving state courts authority over Indian lands, and permitting taxation of reservation lands "confirms disestablishment." Br. 53. But when Congress lifted certain "restrictions on alienation" in 1908, *id.*, that was no different than "offer[ing] non-Indians the opportunity to purchase [Indian] land," *Solem*, 465 U.S. at 470. That does not diminish. *Id.*; *see Mattz*, 412 U.S. at 504-05.

Likewise, when Congress authorized state courts to decide questions concerning allotments, heirship, and partition, it made them "federal instrumentalit[ies]." *United States v. Goldfeder*, 112 F.2d 615, 616 (10th Cir. 1940) (1908 act); *see Springer v. Townsend*, 222 F. Supp. 231, 236 (N.D. Okla. 1963) (1926 and 1947 acts), *aff'd*, 336 F.2d 397 (10th Cir. 1964); *State ex rel. Miller v. Huser*, 184 P. 113, 122 (Okla. 1919) (1918 act). That shows the

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[14] By contrast, Oklahoma relies on irrelevant dicta. Several of its cases inaccurately imply that the Creek Nation ceased to exist, *Grayson v. Harris*, 267 U.S. 352, 353-54 (1925); *Washington v. Miller*, 235 U.S. 422, 423 (1914); *McDougal v. McKay*, 237 U.S. 372, 383-84 (1915), and another merely notes that the Nation no longer owned the fee, *Woodward*, 238 U.S. at 285-86.

opposite of disestablishment. Outside reservations, Congress does not generally deputize state courts as *federal* actors.

Taxes are similar. Br. 53-54. Allotted lands, once free of restrictions, were taxable because Congress *authorized* it. FTA § 19; Act of May 27, 1908, ch. 199, § 4, 35 Stat. 312. That happened on many reservations, including in *Parker*. Act of May 6, 1910, ch. 202, 36 Stat. 348; *see Yakima*, 502 U.S. at 263; *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). This congressional authorization shows that Congress maintained authority over the reservation and merely permitted States to tax portions.

2. Oklahoma notes that it *actually* exercised authority over Indians and their lands and removed many allotment restrictions. Br. 53; *id.* at 54-55 (discussing *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602 (1943)). But that exercise was infected with usurpation, greed, and abuse of congressional authority. *Supra* at 13-15. And Oklahoma criminal courts asserted jurisdiction that the State today concedes was unlawful. *Supra* at 15, 47. Oklahoma wanted Indian lands, at any cost. But that is no basis for divining congressional intent.

3. Oklahoma falls back on claims about "settled expectations" and "turmoil." Br. 3, 56. But *Parker* rejected similar arguments. There, "the Tribe was almost entirely absent," while for "a century and with few exceptions," the federal government and Nebraska treated the land as the State's. 136 S. Ct. at 1081. Yet despite "compelling" concerns about "'justifiable expectations,'" *Parker* unanimously held that

expectations "cannot diminish." *Id.* at 1082 (citation omitted).

The same result follows here. Indeed, unlike the absent Omaha in *Parker*, the Creek Nation "has maintained a significant and continuous presence within the Reservation," where its capital has remained since the Civil War. Pet. App. 130a. And today, many non-Indians in rural Oklahoma receive government services—"medical centers," "emergency response teams," and paved roads, *id.*; *supra* at 16—only because the Nation provides them.

As for "turmoil," Oklahoma's claims are mostly rhetoric. The decision below only modestly realigns criminal jurisdiction. Only 9% of Oklahomans identify as Indian, Br. 15, and Oklahoma will continue to prosecute crimes by non-Indians that are against non-Indians or are "victimless." Dep't of Justice, Indian Country Criminal Jurisdictional Chart, 2010, http://bit.ly/2GQZgav. Minor Indian offenses will proceed in the Nation's courts. *Id.*; *supra* at 16-17. The United States will prosecute major crimes. 18 U.S.C. § 1153. Tellingly, the United States no longer asserts this increase will be significant. *See* BIO 34 (detailing United States' changing, unsupported estimates).

"[C]ivil" implications, Br. 56, are not directly at issue in this capital case—but there, too, Oklahoma's claims are overblown. Oklahoma pretends as if non-Indians have never lived within reservations. Br. 56. Nationwide, however, hundreds of thousands of non-

Indians do so, including in cities.[15] State authority over non-Indians on fee land, accounting for the overwhelming majority of Creek lands, continues largely unchanged: the State retains jurisdiction unless specifically preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (taxes); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning). As for tribal authority, the Creek Nation can *already* regulate its members. Over nonmembers, tribal regulation is presumptively "invalid" even within reservations. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *see Montana v. United States*, 450 U.S. 544 (1981) (regulatory jurisdiction); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (taxes). While Oklahoma's *amici* fret that even this "'limited'" authority will spur litigation, States' *Amicus* Br. 23 (quoting *Plains Commerce*, 554 U.S. at 329-30), this Court dismissed the same claims in *Parker*, citing a doctrine purpose-built to address such claims: *City of Sherrill v. Oneida Indian Nation of New York*. *Parker*, 136 S. Ct. at 1082; *see Sherrill*, 544 U.S. 197, 217-21 (2005) (holding that even where a reservation endures, "equitable considerations of laches and acquiescence may curtail ... [t]rib[al] power").

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15 Palm Springs, California, Wikipedia, https://en.wikipedia.org/wiki/Palm_Springs,_California (last visited Sept. 11, 2018); Puyallup people, Wikipedia, https://en.wikipedia.org/wiki/Puyallup_people (last visited Sept. 11, 2018).

In reality, there is no risk of genuine disruption. When litigators step aside, Oklahoma and tribes collaborate closely: 654 tribal compacts govern cooperation on taxes, fire services, environmental protection, and more. *See* Okla. Sec'y of State, Tribal Compacts and Agreements, https://www.sos.ok.gov/gov/tribal.aspx (last visited Sept. 11, 2018).

If Congress perceived a shortcoming, it could address it tomorrow. Already, the statute books are filled with Oklahoma-specific Indian laws. *E.g.*, 25 U.S.C. §§ 5201-5210; *Cohen's* § 4.07(1)(c), at 300-01. For one, tribes can administer some federal environmental programs in Indian country, but Congress gave Oklahoma—uniquely—a veto. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), Pub. L. No. 109–59, § 10211(a)-(b), 119 Stat. 1144, 1937 (2005). Precisely because Congress's power is so broad, and carries such consequence, it is critical to ensure Congress *actually exercised* its power. That is *Solem*'s point.

IV. If The Creek Reservation Endures, The Court Must Affirm.

1. The Court cannot reverse based on the Solicitor General's argument that Respondent's conviction may stand because Congress supposedly gave Oklahoma criminal jurisdiction regardless of whether the Creek reservation survives. U.S. Br. 28.

First, that issue is not before the Court. At the certiorari stage, the Solicitor General proposed adding a question presented to address it. U.S. Cert. Br. i. The Court refused. Last Term, the Court confronted the

same situation, and "declined" the Government's merits-stage request to revisit the issue. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). That approach is wise. Parties and *amici* should focus on questions the Court grants, not those it rejects. *Cf.* BIO 36-37 (noting previous unsuccessful government efforts to obtain certiorari on this very issue).

Second, the issue is waived. The parties litigated this case, and the Tenth Circuit decided it, on the premise that, if the Creek reservation endures, Oklahoma lacks jurisdiction to try Respondent. Pet. App. 6a-7a, 132a-133a. Oklahoma raised no contrary argument below or in its petition. And despite the Solicitor General's certiorari-stage brief, Oklahoma's sophisticated counsel (sensibly) did not raise the issue in the certiorari-stage reply or opening merits brief. *Cf.* BIO 20 n.6 (noting issue).[16]

2. AEDPA provides no basis to affirm. That is, if the Creek reservation remains, the Court cannot affirm on the ground that the law violated by the OCCA was not "clearly established." Oklahoma has not preserved that

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[16] Regardless, Congress did not give Oklahoma general criminal jurisdiction over crimes by Indians on reservations. At Oklahoma's statehood, the Major Crimes Act conferred federal jurisdiction over qualifying crimes on reservations within "any State." *Supra* at 45. The United States observes that, before statehood, Congress "appli[ed] Arkansas law" to Indians, and after, "extended the territorial laws in force in the Oklahoma Territory over the entire State." U.S. Br. 29. But as explained, the Enabling Act directed crimes by Indians on reservations to *federal* court. *Supra* at 45-46. And it extended Oklahoma territorial law only "as far as applicable." Enabling Act § 13. Oklahoma territorial law did not apply to Indian crimes on reservations.

argument. Its Question Presented does not mention clearly established law, Pet. i, and its brief devotes exactly one sentence to the point, Br. 48. The reason for that strategic decision is clear. Seeking review based on AEDPA would not have met this Court's certiorari criteria or resolved the "uncertainty" that Oklahoma posits. Br. 56.

Regardless, the Tenth Circuit correctly reviewed *de novo*. *Solem* provides the "well settled" disestablishment "framework." *Parker*, 136 S. Ct. at 1078-79. The OCCA not only failed to apply *Solem*, but "flipped the presumption" that a reservation continues "until Congress acts," Pet. App. 52a-53a—a presumption that Oklahoma concedes applies. Br. 19-20. That contradicted clearly established law. *De novo* review was thus appropriate. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); Pet. App. 56a-57a.

* * *

Oklahoma opens its brief with a full-color picture of Tulsa. Br. 3. And understandably so: Its legal arguments are squarely foreclosed. But Oklahoma's appeal to "unique circumstances" and "present-day reality" is a call for equitable relief, not a theory of statutory construction. Congress and the Court have ways to address those concerns that do not involve consigning *Solem* and *Parker* to the waste bin.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

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No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF

Petitioner (at 4, 19–21, 25, 32) invited respondent to explain what attribute of a reservation remained intact for the Five Tribes after statehood in 1907. He offered no answer. What remains undisputed is that, by statehood, Congress expressly destroyed the tribes' communal land patents, their courts, and their jurisdiction over eastern Oklahoma; stripped the tribes of their buildings and furniture, and their ability to determine tribal membership; revoked their power to levy taxes; and subjected the tribes and their members to state law and jurisdiction. These congressional acts amply demonstrate the extinguishment of any reservations of the Five Tribes.

Rather than engage, respondent argues that under *Solem*, allotment does not disestablish reservations absent language equivalent to cession, and that nothing Congress did in the march to statehood expressly dismantled a reservation—a reservation with attributes as of 1907 that respondent never defines. This Court should not risk letting hundreds of violent criminals walk free and divide Oklahoma in half when respondent never explains how any attribute of a reservation survived Congress's 20-year campaign to dismantle Indian Territory.

It is also implausible that immediately upon statehood, federal courts, federal prosecutors, state courts, state prosecutors, this Court, and the Solicitor General mistakenly thought that the State had criminal jurisdiction over Indians. Had eastern Oklahoma been a reservation after 1907, the federal courts would not have transferred scores of Indian prisoners and cases to the State for prosecution—contrary to the Major Crimes Act. But Congress directed that path in the Enabling Act consistent with the reality

that eastern Oklahoma was not a reservation, and everyone acted accordingly. To accept that this area has been a reservation all along makes a mockery of the State's jurisdictional history and would shock the 1.8 million people living in eastern Oklahoma today. Pet. 15–23; Cert. Reply 1–2.

Today, the Five Tribes are flourishing, and state-tribal relations are at their zenith. The tribes owe their current success to Congress's change in Indian policy in 1936—not, as respondent suggests, to tribal jurisdictional boundaries that went unacknowledged for a century. There is no need to upend the status quo and rewrite history by splitting Oklahoma in two.

I. Congress stripped the Five Tribes of any reservation status.

1. Respondent argues (at 28–29) that a reservation is any defined tract of land reserved under federal protection for Indian occupation. Respondent therefore claims (at 28) that the destruction of the patent was meaningless because it merely provided "more protection" for the lands reserved within the 1866 boundaries. But respondent's concept of a reservation is plainly too broad, as it equally describes trust lands and restricted allotments. And boundaries on their own mean nothing without attendant sovereign rights coextensive with the land. Br. 31–32.

Respondent thus elsewhere acknowledges (at 6) that any Creek reservation derives from treaties in 1832, 1833, and 1856 that "guarantee[d] the Nation's rights within its borders." Those rights were "'self-government' and 'jurisdiction over person and property, within [its] limits.'" Resp. 6 (quoting Treaty with the Creeks and Seminoles arts. II, III, Aug. 7,

1856, 11 Stat. 699). It is precisely those rights that Congress ended: Congress destroyed the patent through allotment while dismantling tribal governmental powers and creating a new State. Br. 28–38.

Attacking a straw man, respondent argues (at 38) that Congress's destruction of communal ownership and "adjust[ment]" of treaty rights did not "eliminate[] all the Creek's treaty-based rights." But respondent's reliance (at 39) on unidentified "remaining treaty rights" is hollow. Respondent identifies no other salient treaty rights relevant to reservations. The State is not arguing—nor need it prove—that Congress invalidated the treaties in their entirety. To the extent the treaties created a bundle of rights conferring reservation status on the Creek Nation's territory, Congress expressly extinguished every such right.

Respondent contends (at 40–42) that Congress did not actually abrogate its treaty promises because, by allotting Indian Territory, Congress gave effect to the treaties by ensuring that tribal members had equal enjoyment of the land. But whatever other purposes the Dawes Commission and Congress thought allotment served, there is no dispute that allotment in Indian Territory destroyed the Five Tribes' communal land ownership.

Respondent also points (at 41–42) to statements by Congress and the Dawes Commission apparently endorsing the treaties. But the Commission's *raison d'être* was "the final dissolution of the tribal government." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911). The Commission's task necessarily demanded the repudiation of the treaties' core promises of communal land tenure, tribal territorial sovereignty, and freedom from statehood. Accordingly, its negotiating

statements indicating that the federal government did not "undertake to deprive any of your people of their just rights" can scarcely be taken at face value. J.A. 23; *see Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443 (D.C. Cir. 1988) (intent to "abrogate ... power[s] of self-government expressly reserved by earlier treaties").

Respondent quotes Senator Perkins for the view that statehood could be compatible with "the rights which have been given to [the Five Tribes] under the treaties." Resp. 40–41 (quoting 24 Cong. Rec. 268 (1893)). But Senator Perkins went on to explain that "if [the tribes] did not consent to Statehood, so much of the treaty would be violated by bringing them into the Union as a State." 24 Cong. Rec. 268.

2. Respondent emphasizes (at 11, 33–34, 42–43) the Creek Nation's political existence after statehood. *See also* Creek Br. 15–19. But no case or principle of Indian law supports the proposition that mere tribal existence is evidence of reservation status or overcomes disestablishment. Br. 36. Respondent points (at 32–33) to Article III of the 1833 treaty as having "pegged the reservation to the Creeks' 'exist[ence] as a nation,' ... not any particular government powers." Not so. It was the *fee patent* that Congress pegged to tribal existence. Treaty with the Creeks art. III, Feb. 14, 1833, 7 Stat. 419 ("The United States will grant a patent, in fee simple, to the Creek nation ... and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation."). No one argues that the Creeks currently own Tulsa and the surrounding area in fee simple.

Respondent argues (at 33) that § 42 of the Creek Allotment Agreement, ch. 676, 31 Stat. 872 (1901),

preserved the Creeks' authority over the land. But the 1901 agreement hobbled the Creek government, declaring that no Creek legislation shall have "any validity" without presidential approval. § 42, 31 Stat. 872. In the same statute, Congress secured the Tribe's agreement to its own demise. § 46, 31 Stat. 872. The Creeks could not enforce their laws against anyone because Congress had abolished Creek courts and banned federal courts from enforcing tribal law. Curtis Act, ch. 517, §§ 26, 28, 30 Stat. 504–05 (1898). Respondent cannot pretend the allotment agreement empowered the Tribe by wishing away the planned March 4, 1906 tribal expiration date or the ongoing dismemberment of tribal government that followed.

Respondent (at 33–34) cites *Morris v. Hitchcock*, 194 U.S. 384 (1904), for the proposition that the Creeks' territorial sovereignty survived the Curtis Act. But *Morris* upheld only the federal government's ability to collect tribal permit taxes on unallotted tribal land—authority that the Curtis Act expressly reserved. *Id.* at 384–85; Curtis Act § 16, 30 Stat. 501–02. *Morris* says nothing about tribal jurisdiction over non-Indians, on non-Indian-owned fee land within the former boundaries of the Indian Territory, after 1907.

While *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (cited at Resp. 33–34), upheld the Creeks' taxing authority over non-Indian land, Congress subsequently abolished tribal taxes entirely in the Five Tribes Act. Br. 35. Moreover, this Court "never endorsed" *Buster*'s reasoning as to tribal jurisdiction over non-Indians on non-Indian fee land, and has emphasized that *Buster*'s broad reasoning is "not an authoritative precedent." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.4 (2001). No one has identified a single

sovereign power the tribes exercised over land or non-Indians in the former territory post-statehood.

Respondent contends (at 11, 33–34, 42–43) that, despite years of assaults on tribal sovereignty, Congress reversed decades of federal Indian policy by extending the "present tribal government[]" in § 28 of the Five Tribes Act, ch. 1876, 34 Stat. 148 (1906). That provision, at the end of a statute whose very title and preceding provisions reflect the final disposition of tribal affairs, *e.g.*, §§ 11, 18, 27, 34 Stat. 141, 144, 148, was a stopgap measure to conclude tribal affairs. Br. 36. Respondent does not argue that Congress restored a single power it had stripped away. Everyone understood that tribal authority was limited to winding down their affairs, such as by signing deeds and liquidating tribal property. Br. 36–37; U.S. Br. 15–16.

Congress did not preserve tribal governments out of a newfound concern for tribal sovereignty; rather, Congress knew that allotment had not been completed as early as planned, and wanted to prevent land worth tens of millions of dollars from becoming a "gift to the railroads" through a legal technicality that would be triggered by the dissolution of tribal governments before the Dawes Commission allotted all tribal land. 40 Cong. Rec. 2974 (Sen. Bailey); *see also id.* at 3121 ("Now, I want to state ... the purpose I have in this, and I make no concealment of it. I am trying to prevent the railroad from obtaining that land."); *id.* at 2976 (Sen. McCumber) (similar); Br. 12–13.

Congress extended tribal governments "so that no losses will result from the dissolution of the tribes and no new interest will attach, while at the same time we are carrying out the provisions ... which we

have been carrying out gradually for the last eight years looking to the dissolution of these tribes." 40 Cong. Rec. 3055 (Sen. McCumber). Respondent cannot transform Congress's eleventh-hour concern about contingent railroad grants into a legislative commitment to preserve tribal reservations.

Respondent relies (at 11, 43) on a 1906 floor statement by Senator Teller that there "is not any necessity ... for ... dissolution," and that it was "better indefinitely and for all time to continue" tribal governments. Respondent omits key context. The senator stated that there was "not any necessity *just now* for the dissolution of the Indian government," and "[i]t would be very much better indefinitely and for all time to continue the government that exists there *than it would be to take the chance of allowing these lands to be absorbed by the railroad company*." 40 Cong. Rec. 3122 (emphases added). Congress did not thereby reverse decades of federal Indian policy; Congress rather continued the tribal governments to allow allotment to be completed and to prevent railroads from obtaining valuable land for free. Br. 12–13.

3. Respondent sets up another straw man in arguing (at 30–31) that, under *Solem*, allotment alone does not disestablish a reservation. The State has never relied on allotment in a vacuum, and this case is about more than just an isolated surplus land act. *See infra* pp. 14–17. Allotment here divested the Tribe of "all right, title, and interest" in the land, Creek Allotment Agreement § 23, 31 Stat. 868, and was an integral part of a legislative campaign to abrogate treaty promises and supplant the tribes' territorial sovereignty with the authority of a new State.

Respondent also suggests (at 30–31, 36) that, because more than three quarters of the Five Tribes' former territories were held as restricted allotments at statehood, the land's status was materially indistinguishable from a reservation. But after statehood, it remained "doubtful whether lands allotted to Indians remained Indian country." *U.S. Exp. Co. v. Friedman*, 191 F. 673, 676 (8th Cir. 1911). Courts eventually ruled that restricted allotments retained Indian country status. *See United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989). But two allotments together do not equal a reservation—nor ten, nor 16 million. Each parcel of land was subject to an individual analysis to determine whether it retained Indian country status.

Had Congress preserved the Five Tribes' territories as reservations, all land within the 1866 external boundaries, not just restricted allotments, would have been Indian country indefinitely. Because that did not occur, state and federal courts have labored to discern the contours of checkerboard jurisdiction in the former Indian Territory ever since statehood. Br. 44–46 (citing cases).[1] Respondent nowhere acknowledges these debates, much less disputes that the decisions would all have been wasted ink had the entire former Indian Territory held reservation status. *Id.*

Even if a snapshot of eastern Oklahoma upon statehood included many restricted allotments, that number soon dwindled. Br. 53. Congress lifted restrictions on alienation sooner than anticipated,

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[1] *See also Hous. Auth. of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Hanes v. State*, 973 P.2d 330 (Okla. Crim. App. 1998); *Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992).

shortly after statehood. *Id.* In 1908, Congress freed another 8.4 million acres from restrictions, making a majority of the Five Tribes' former lands alienable. *See* Act of May 27, 1908, ch. 199, § 4, 35 Stat. 313; H.R. Rep. 1454, 60th Cong., 1st Sess., at 4 (1908). Within two decades, 89% of the former Indian Territory was unrestricted. Br. 53.

4. Respondent argues (at 12, 37–38) that the Oklahoma Enabling Act was a "victory" for the tribes because it "expressly confirmed that statehood did not divest tribal rights." But the Act preserved only then-existing "rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished)," and acknowledged the federal government's authority over Indian affairs. Ch. 3335, § 1, 34 Stat. 267 (1906). Notably, the provision refers to rights of Indians, not tribes. And the Act never refers to the territories of the Five Tribes as reservations, in contrast to its specific mention of the Osage and other reservations in Oklahoma Territory. §§ 6, 8, 34 Stat. 271, 273. Thus, when this Court in *Coyle v. Smith*, 221 U.S. 559, 570 (1911), noted that the Enabling Act preserved Congress's authority over "large Indian reservations and Indian population of the new State," the Court did not recognize reservation status for the former territories of the Five Tribes. Indeed, the Court has often recognized the opposite. Br. 54–55.

That the federal government retained authority over Indians—who were still members of federally recognized tribes—does not mean the entire Indian Territory retained Indian country status. It is little wonder that respondent's own source describes the purported "victory" in the Enabling Act as "insignificant" when measured against the consequences of

statehood. Tanis C. Thorne, *The World's Richest Indian* 41 (2003).

Respondent's observation (at 35, 37) that reservations are compatible with states generally is unremarkable. He misses the point: here, statehood unquestionably broke the treaty promises that established the Five Tribes' land tenure. Br. 5, 27. Nowhere other than in Oklahoma were allotment and tribal disempowerment part and parcel of the statehood process itself. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627 (1970).

II. Congress's transfer of criminal jurisdiction to Oklahoma confirms disestablishment.

The idea that reservations extended to the borders of the former Indian Territory cannot be reconciled with Congress's transfer of criminal jurisdiction to Oklahoma upon statehood. Br. 39–43. Respondent replies (at 45–48) that the State never had jurisdiction to prosecute Indians in eastern Oklahoma, and thus acted illegally. That contention conflicts with the Enabling Act and implausibly speculates that federal courts, federal prosecutors, the State, the Solicitor General, and this Court all were mistaken when they read the Enabling Act as granting state courts criminal jurisdiction over Indians in the former Indian Territory. Respondent cannot dispute this universal understanding at statehood; he merely contends that everyone's understanding was wrong.

1. The Enabling Act directed the federal courts for the Indian Territory to transfer all pending federal-question and diversity cases to the new federal district courts for Oklahoma; all other cases were transferred to state courts. Br. 39. Were the entire former Indian Territory a reservation after statehood, criminal cases involving Indians should have

stayed in federal court under the Major Crimes Act or the General Crimes Act. On that, both sides agree. Br. 39–40; Resp. 45–46.[2]

But those cases did not stay in federal court. Upon statehood, the territorial courts and the newly created federal district court transferred case after case—involving Indians and non-Indians alike—to the new state courts. Br. 39–43 & nn.9–11. From statehood on, state courts have exercised criminal jurisdiction over crimes—major and minor—committed by and against Indians in the former Indian Territory. Br. 42; U.S. Br. 30; Sheriffs Br. 22–24. Federal prosecutors have never once treated the area as a reservation. Br. 42; U.S. Br. 21–22. Neither has the Creek Nation.

This Court and the Solicitor General in *Hendrix v. United States*, 219 U.S. 79 (1911), understood from the outset that Congress transferred jurisdiction over Indians in the former Indian Territory to the State of Oklahoma. Br. 42–43. Respondent does not argue otherwise. *Cf.* Resp. 47 n.10. It is difficult to imagine better evidence of the original meaning of the Enabling Act than the universal understanding implemented by everyone at the time.

2. Respondent cites (at 46–47) instances in which other States unlawfully prosecuted crimes committed by and against Indians. But in none of those examples did federal courts immediately transfer all cases involving Indians to newly formed state courts. Respondent cannot explain why, on his theo-

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[2] Respondent also argues (at 45, 48) that violations of Arkansas law committed in Indian Territory would be considered "federal" crimes, too. Were that true, all crimes committed in Indian Territory before statehood would have been federal, and no criminal cases would have been transferred to state court.

ry, federal courts and prosecutors abdicated their responsibility to prosecute federal crimes in eastern Oklahoma for the past 111 years. Br. 42–43.

Respondent claims (at 47) that the State "*concedes*" that it illegally prosecuted some Indian crimes after statehood, at least on restricted allotments. We do not. For decades, Oklahoma courts held that restricted allotments in the former Indian Territory were not Indian country. Br. 45 (citing *Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936)). No court held otherwise for half a century. *Id.* (citing *Sands*, 968 F.2d 1058; *Klindt*, 782 P.2d 401). Again, respondent does not dispute that the debate over jurisdiction for crimes committed on Indian allotments would have been moot if the whole former Indian Territory had been a reservation.

Respondent argues (at 45) that the Enabling Act's transfer provisions "applied only to 'causes pending' at statehood, not *new* cases." Of course only pending cases were transferred. All new cases post-statehood were brought in the "successor" state courts. Enabling Act § 19, 34 Stat. 277. Congress could not plausibly have intended to transfer all pending cases involving Indians to state court, while directing all new cases involving Indians to federal court.

3. Had reservations survived statehood, no court would have had jurisdiction over most crimes committed by Indians against Indians within the former Indian Territory until Congress reauthorized tribal courts in 1936. Br. 43–44; U.S. Br. 30–31. Respondent argues (at 47–48) that federal courts retained jurisdiction to enforce Arkansas law against Indians even after statehood—based on an 1897 statute that extended Arkansas law to all people in Indian Terri-

tory, regardless of race. Act of June 7, 1897, ch. 3, 30 Stat. 83. But the Enabling Act superseded the 1897 Act by extending the laws of Oklahoma Territory to the former Indian Territory, supplanting Arkansas law, until the new state legislature provided otherwise. §§ 2, 13, 21, 34 Stat. 268–69, 275, 277–78. It is implausible that Congress intended Arkansas law to govern eastern Oklahoma indefinitely—even after the new State's legislature enacted generally applicable criminal laws for the entire State.

Respondent (at 48) is also wrong that the State's position creates a jurisdictional gap of its own on the basis that the State could not prosecute Indian-on-Indian crimes on restricted allotments. As noted, no court defined Indian country to include restricted allotments in former Indian Territory until long after Congress reauthorized tribal courts. Br. 44–45; *supra* pp. 8, 12. Respondent's suggestion (at 48–49) that the Bureau of Indian Affairs could have closed any gap by establishing Courts of Indian Offenses supports petitioner. That the BIA *could* have established such courts *but did not* proves the State's point: the federal government saw no gap to close because eastern Oklahoma was not Indian country. *See also* Cert. Reply 10–11.

4. The United States argues alternatively that Oklahoma had jurisdiction to try Indians in the former Indian Territory even if the area were one giant reservation. U.S. Br. 32–33. Oklahoma has not pressed that argument for three reasons. First, the best way to reconcile the Major Crimes Act and the Enabling Act is to conclude that eastern Oklahoma is not a reservation, full stop. Br. 38–39. Second, a holding by this Court that leaves for another day whether eastern Oklahoma is a reservation would do nothing to ameliorate uncertainty caused by the de-

cision below, including as to civil jurisdiction. *See* Pet. 19–20; Envtl. Fed. Okla. Br. 7–15; IMLA Br. 5–10; States Br. 20–25 & n.1. Third, adopting the United States' argument virtually guarantees that Indians prosecuted by the federal government on restricted allotments since 1992 will collaterally attack their convictions on the theory that the *State* should have prosecuted them.

III. Even *Solem* confirms disestablishment.

1. The State is not asking this Court to "consign[] *Solem* "to the waste bin," Resp. 59, but instead to recognize what that line of precedent stands for, Br. 46–48. *Solem* and its progeny involve gleaning congressional intent from clues in surplus land acts that spoke only to land title, to determine whether those acts also "divested ... all Indian interests." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). No surplus land acts are involved here.

Moreover, Congress expressly terminated all relevant "Indian interests" in the former Indian Territory. Searching for words such as "cession" or returning lands to the "public domain" in a single statute distracts from the bigger picture. Br. 48–49; U.S. Br. 23–25. We have far more than an isolated surplus land act. Congress divested all Indian interests in the Five Tribes' historical territories by explicitly and unambiguously destroying tribal title, jurisdiction, seclusion, and the foundations on which the Creek Nation's territorial sovereignty had been grounded.

Respondent contends (at 27) that this *is* a surplus land act case, because the Five Tribes Act permitted sale of remaining "surplus" unallotted land to non-members. But the proceeds of those sales, after tribal debts were satisfied, were distributed to individual tribal members per capita, Five Tribes Act

§ 17, 34 Stat. 143–44—not expended annually by the Secretary of the Interior to benefit the tribe, which might suggest a reservation, *see, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1077 (2016). Disbursement to individual members confirms that the Creek communal tribal estate was liquidated and divided among individual members. Respondent's narrow focus on surplus lands attempts to divert attention from two decades of legislation divesting the tribes of communal land, territorial sovereignty, and independence from statehood.

Invoking the "Allotment Era," respondent contends (at 26) that Oklahoma's history should be analyzed no differently than this Court's surplus land act cases. *See also* Historians Br. 4–8. But the General Allotment Act excluded the Five Tribes because Congress doubted it "had any authority to interfere with the rights of those Indians" in Indian Territory due to their unique land ownership. 18 Cong. Rec. 191 (1886) (Sen. Perkins). The State does not rely on allotment alone to show disestablishment; allotment was concomitant with the destruction of tribal sovereignty and the creation of Oklahoma. That the dissolution of the Five Tribes happened contemporaneously with allotment elsewhere and involved a superficially similar mechanism does not erase the unique purposes for which Congress pursued allotment in the Indian Territory. *See supra* pp. 2–10.

2. Respondent heavily relies (at 24–26, 31–32) on the fact Congress did not use statutory language of "cession" as opposed to allotment. But *Hagen v. Utah*, 510 U.S. 399 (1994), held that no particular formulation was required to effectuate disestablishment. Here, the relevant text is spread out across numerous statutes that expressly and unambiguous-

ly abrogated the Tribes' treaty promises of land tenure and territorial sovereignty.

Respondent contends (at 31–32) that cession and allotment were not equivalent, pointing to the Dawes Commission's observation that cession would have "immeasurably simplified" matters. To be sure, conveyance of the entire tract of land for one lump sum payment would have been far easier than the decades-long and unprecedented ordeal of enrollment and piecemeal allotment. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914*, at 125–53 (1999). Recognition that one path is harder does not disprove that Congress saw allotment and cession as alternative means to the same end: the "extinguishment of ... tribal title" to create a new State. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. A less "radical scheme of tribal extinguishment," Resp. 40, is still extinguishment.

Because the Five Tribes were not on traditional reservations, but on lands patented to them in fee simple, Br. 24, Congress could not simply "vacate[] and restore[]" Creek land to the "public domain," as it could with other reservations, Resp. 31 (citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962)). In yielding to Creek resistance to cession, Congress did not agree that the Creek territory should remain intact. Quite the contrary, Congress tasked the Dawes Commission with using whatever means necessary to extinguish tribal territory to create a new State. Respondent offers no historical evidence that anyone at the time thought that the difference between cession and allotment was determinative of reservation status. Any such notion is disproven by the Creeks' consent in the 1901 Allotment Agreement to the termination of

their government. Respondent never explains why, if the Creeks believed they had thwarted disestablishment by opposing cession, they nevertheless agreed to the death of their own government. *See* Br. 51.

3. The historical context confirms what the statutory language expressly accomplished: Congress acted to dismantle the Five Tribes, brick by brick, to pave the way for statehood. Respondent and the Tribe cast aspersions on "pop historians" and contemporaneous chroniclers of Oklahoma's history. Resp. 39; Creek Br. 3. But respondent's *amici* rely on the same scholars, *see* Historians Br. ix, and the sources that respondent cites agree: "The U.S. government betrayed its treaty with the Creek. The Creek institutions were crushed and the nation's resources stolen." Thorne 15. The "destructive wave" of allotment left "little ... of the Five Civilized Tribes' treaty rights, their political and educational institutions, or their landed estate." *Id.* at 36.

Even if, as the Tribe insists (at 23–24), the Creek Nation was not a "late tribe" because its existence had been "nominally continued," 42 Cong. Rec. 2585 (1908) (Sen. Owen), neither respondent nor the Tribe identifies what functions the government exercised apart from signing deeds and winding down tribal affairs, *see id.* at 2586 (Sen. Curtis).

4. The subsequent history confirms disestablishment. The Creek Nation cites no instance where it has publicly claimed, from 1907 until this litigation, that a Creek reservation existed after statehood. The Cherokee Nation has gone further, advising the public that "[t]he Cherokee Nation is *not* a reservation." Cherokee Nation, *Frequently Asked Questions*, https://bit.ly/2RRptM3. Respondent invokes (at 16) the "new" Creek constitution, but even

that document—merely "approved" by the Secretary of the Interior in 1979 as being not "contrary to applicable laws," 25 U.S.C. § 5123(d)(1)—asserts only "political jurisdiction." Until this case, the Creek Nation has never expressed that it had a reservation or any rights of territorial sovereignty coextensive with the 1866 boundaries. The Creeks may have founded Tulsa, *see* Creek Br. 11, but they have not treated that city as part of an Indian reservation in the past century.

Sporadic references to reservations or the Creek Nation are unavailing. Respondent suggests (at 51) that the Oklahoma Indian Welfare Act's use of the phrase "within or without existing Indian reservations" acknowledged a Creek reservation. The statute—which applies to all tribes, statewide—does not recognize any reservation of the Five Tribes. So, too, with references to "the Creek Nation" by Congress and the Interior Department. Resp. 50–52. No one disputes that the Creek Nation persisted as a federally recognized tribe; specific references to its land were merely historic signifiers. Br. 33–34.

A passing mention in an Interior Department report to an oil field in "the Creek Reservation" is eclipsed by discussion in the same report of the near-completion of allotment and the dissolution of tribal affairs. Dep't of the Interior, *Administrative Reports*, vol. II, at 42 (1913). The 1924 mining lease rules, *see* Resp. 51, applied to "*unallotted land* on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation." Act of May 29, 1924, ch. 210, 43 Stat. 244 (emphasis added). At most, Congress clarified that the tiny fraction of land remaining in the Five Tribes' hands in 1924 was not subject to the new rules; but Congress did not recognize a Creek reservation.

Statements by courts about "Indian country" in Oklahoma after statehood, Resp. 52–53, undercut respondent's position because, as stated, *supra* p. 8, those courts necessarily proceeded from the assumption that no reservation existed. In *United States v. Wright*, 229 U.S. 226, 232 (1913), for example, the Court accepted that "the effect of allotment would be ... that the lands allotted would cease to be Indian country." To enforce anti-liquor laws in what was soon to be the former Indian Territory, Congress amended the federal liquor statute to provide that, for these purposes, the "term [Indian country] shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States." *Id.* at 231. If all of Muskogee County had been a reservation after allotment, such terminology would have been unnecessary.

The same is true of *Friedman*, 191 F. at 679, in which the court observed that "about 3,000,000 acres" of "unallotted and undisposed" land still owned by the Five Tribes had not "ceased to be Indian country." This parcel-by-parcel analysis belies the existence of a reservation.

Respondent and the Tribe blame an "orgy of lawlessness" for the dispossession of Creek lands. Resp. 53–54; Creek Br. 22. But it was Congress's hasty lifting of restrictions that enabled plunder. And Congress allowed state courts (as "federal instrumentalities," Resp. 52) to exercise jurisdiction over restricted allotments by applying state law to heirship and partition, even as Congress elsewhere placed such issues under federal administrative control pursuant to federal regulations. Br. 53–54.

While Respondent observes (at 54) that unrestricted allotments became subject to state taxation only because the 1908 Act so provided, § 4, 35 Stat. 313, the Five Tribes Act had already provided that allotted lands would become subject to state taxation after they passed from the original allottee, § 19, 34 Stat. 144. The 1908 Act removed this alienation requirement in order to accelerate the transfer of the former Indian Territory to Oklahoma's taxing authority. H.R. Rep. 1454, at 1–2. Again, the point is that such extensive State taxation of the former lands of the Five Tribes would have been incongruous with an intent that the area remain a reservation. Br. 54.

5. Affirmance would force a sea change in the balance of federal, state, and tribal authority in eastern Oklahoma, in everything from criminal jurisdiction to the regulation of Oklahoma's oil industry. Br. 56; *see also* OIPA Br. 29-32; IMLA Br. 11–23; Envtl. Fed. Okla. Br. 8–15; States Br. 19–25. Respondent's *amici* speak as if this case involves taking away a reservation. But from 1907 to today, the Five Tribes, the State, and the federal government have never treated eastern Oklahoma as a reservation, not once, not for any purpose, not ever.

Respondent claims (at 55) that affirmance would "only modestly realign[] criminal jurisdiction" because only 9% of Oklahomans identify as Indian. But 9% is an extraordinary figure, particularly considering that criminal jurisdiction would shift in cases involving crimes committed either by *or* against Native Americans in an area of 1.8 million residents. Respondent brushes past other immediate effects of affirmance: the vacatur of his capital conviction for a brutal murder and the risk of reopening hundreds of other convictions that the federal government may

be unable to retry. Pet. 18–23. An onslaught of collateral attacks already exists. Cert. Reply 3.

Other ramifications abound. Respondent's *amici* highlight that tribes have criminal jurisdiction over non-Indians for domestic violence offenses committed on a reservation. NCAI Br. 36 (citing Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54); *see also* NIWRC Br. 1. As they note, affirmance would instantly and "significantly increase" criminal tribal jurisdiction over millions of acres of land. NCAI, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* 56 n.31 (2018); *see* NIWRC Br. 1.

As for civil jurisdiction, all adoptions and custody disputes involving Indian children who reside or are domiciled within the 1866 boundaries would now be within the exclusive jurisdiction of tribal courts. Br. 56; 25 U.S.C. § 1911(a). And the Seminole Nation recently issued letters purporting to assert permitting authority over all oil and gas activity within their 19th century borders. *Seminole Nation issues 8% severance fee notice*, OIPA News (Oct. 15, 2018), https://bit.ly/2CrCTcL. Affirmance would usher in a jurisdictional revolution.

Respondent states (at 5) that "Congress regularly legislates to address state and tribal authority in Oklahoma," and that "Congress will be equally responsive here." Those reassurances tacitly acknowledge the chaos waiting in the wings. Even respondent's belief (at 57) that all will be well as long as "litigators step aside" confirms the looming tide of litigation that will mire federal and state courts for decades. IMLA Br. 5–10; States Br. 20–25.

While the Five Tribes' present-day provision of governmental services alongside state and local authorities is laudable, Resp. 55; Creek Br. 26–31; Boren Br. 8–10, that system has developed without formal reservations. Accordingly, the State bears the responsibility to seek justice for Indian victims of crime, including on behalf of the Indian victim in this case—justice respondent seeks to escape. Reversal of the decision below will not change the tribes' ability to continue providing governmental services; nor will it undermine the collaboration between tribal and State officials that exists now. But affirmance would throw the State into disarray for decades to come.

CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

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No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

2. Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this brief in response to the Court's December 4, 2018 order directing supplemental briefing.

I. Oklahoma has criminal, civil, and regulatory jurisdiction within the boundaries of the former Indian Territory.

This Court directed the parties to address: "Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status." The answer is yes.

1. Statutes enacted in 1897, 1898, 1904, 1906, and 1907 conferred jurisdiction on Oklahoma to prosecute crimes within the 1866 boundaries of the Creek Nation, as well as the historical boundaries of the other Five Tribes. In 1897, Congress conferred exclusive jurisdiction on the U.S. courts in Indian Territory to try all criminal cases and applied U.S. and Arkansas law irrespective of the defendant's race. Indian Department Appropriations Act of 1897 ("1897 Act"), ch. 3, § 1, 30 Stat. 83. This ended disparate treatment in the application of substantive law and jurisdictional determinations on the basis of Indian status in eastern Oklahoma—a policy from which Congress never deviated. *See* U.S. Br. 16.

The Curtis Act in 1898 abolished tribal courts and rendered tribal law unenforceable. Ch. 517, §§ 26, 28, 30 Stat. 504–05. In 1904, Congress confirmed that Arkansas law extended to all persons and estates in Indian Territory, "Indian, freedman, or otherwise." Act of Apr. 28, 1904 ("1904 Act"), ch. 1824, § 2, 33 Stat. 573. And the Oklahoma Enabling

Act, as originally enacted in 1906 and as amended in 1907, directed the transfer of all pending federal criminal cases to the newly created federal courts in Oklahoma, ch. 3335, § 16, 34 Stat. 276, and directed all other cases to the newly created state courts, including cases involving major crimes, §§ 17–20, 34 Stat. 276–77. Accordingly, the laws of Oklahoma Territory (and eventually the State of Oklahoma) supplanted the Arkansas law that had applied to all persons irrespective of race, and the state courts became "the successors" of the territorial courts. *Stewart v. Keyes*, 295 U.S. 403, 409–10 (1935). Federal territorial courts thus transferred all pending nonfederal cases to the new state courts, and the state courts also assumed jurisdiction over new prosecutions. Since that time, no case involving Indians has ever been heard in federal court on the theory that the former Indian Territory is reservation land. Br. 38–43. And no act since statehood reinstated distinctions based on Indian status with respect to major crimes committed in the former Indian Territory.

The statutory definition of Indian country (to which the jurisdictional provision of 18 U.S.C. § 1153 applies) includes "land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a). Under ordinary principles of statutory construction, therefore, even if a reservation-like boundary remained in place, the generally applicable 1948 extension of federal jurisdiction under the Major Crimes Act to lands identified in § 1151 does not supersede the more specific jurisdictional grants of authority to Oklahoma with respect to the former Indian Territory. *See* U.S. Br. 31. And the federal government has not brought a single prosecution under § 1153 in the State's 111-year history based on formal Indian-reservation sta-

tus in Oklahoma as defined by § 1151(a). The State thus has jurisdiction to prosecute crimes committed by tribal members within the 1866 boundaries of the Creek Nation, regardless of the area's reservation status.[1]

2. The first question in the Court's order suggests that the Court could leave open whether the Five Tribes' former territories constitute Indian reservations today. But such a holding would call into question the longstanding status quo: that eastern Oklahoma is not treated as a group of reservations, and federal and tribal governments have primary authority only over scattered parcels of Indian country such as restricted allotments and trust lands. Such a result may in fact have broader ramifications that would extend beyond the criminal context.

To start with, the statutes discussed above, by their own terms, apply equally to *civil* cases. The 1897 Act granted the federal courts in the Indian Territory exclusive jurisdiction over "all civil causes

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[1] A contrary holding would call into question hundreds, if not thousands, of state convictions. Over 2,000 prisoners in state custody who committed crimes in eastern Oklahoma self-identify as Native American—including 155 murderers, 113 rapists, and over 200 felons convicted of crimes against children. These figures do not include the unknown number of non-Indians convicted of crimes against Indian victims. This information is derived from publicly available data that Oklahoma maintains on all inmates, which lists the inmate's self-identified race, crime of conviction, and county of conviction. Oklahoma Dep't of Corrections, *OK Offender*, https://okoffender.doc.ok.gov/. As the Tenth Circuit noted below, "[i]n Oklahoma, issues of subject matter jurisdiction are never waived" and there are no apparent procedural bars to raising lack of subject matter jurisdiction in state-court collateral challenges to convictions. Pet. App. 13a–14a n.5.

in law and equity" involving "any person" in Indian Territory. 30 Stat. 83. And the direction that Arkansas law would apply to "all persons," "irrespective of race," was not limited to criminal cases. *Id.* The Curtis Act, in banning enforcement of tribal law, likewise applied to civil and criminal substantive law. § 26, 30 Stat. 504. Congress ordered "all civil and criminal causes then pending in any [tribal] court" to be transferred to the territorial courts, where they were adjudicated under Arkansas law. § 28, 30 Stat. 504–05.

Thus, even with respect to civil cases, the 1897 Act, along with the Curtis Act, "operated to displace the Creek tribal laws" and "substitute in their stead [provisions of] Arkansas law." *Washington v. Miller*, 235 U.S. 422, 425 (1914); *Sizemore v. Brady*, 235 U.S. 441 (1914) (affirming Oklahoma Supreme Court decision that Arkansas, not Creek, law governed inheritance); *see also George v. Robb*, 64 S.W. 615 (Indian Terr. 1901) (Arkansas law applied to inheritance dispute between Creek citizens as a result of the abolition of tribal courts and unenforceability of tribal law).

The 1904 Act similarly provided that "*[a]ll* the laws of Arkansas" in force in Indian Territory—including civil and regulatory provisions—were extended to all persons in the Territory, irrespective of race. § 2, 33 Stat. 573 (emphasis added); *see, e.g.*, Mansfield's Digest of the Statutes of Arkansas (1884), ch. 11 (practice of law), ch. 15 (corporations), ch. 94 (legal notices and advertisements). Thus, the 1904 Act, too, applied to civil cases. *Palmer v. Cully*, 153 P. 154 (Okla. 1915) (confirming Arkansas law governed marriage between two tribal members after 1904). And upon statehood, Oklahoma law would supplant Arkansas law. *Jefferson v. Fink*, 247 U.S.

288 (1918) ("It seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of the admission of the new state, in the substitution of the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory.").

The Enabling Act's transfer provisions likewise applied to "all cases." § 17, 34 Stat. 276–77. At oral argument, it was suggested that the 1907 amendment to the Enabling Act "makes clear that the transfer is only of criminal cases." Oral Arg. Tr. 26:5–10. But the 1907 amendment transferred to state court all cases of a local nature, whether "*civil* or criminal." Act of March 4, 1907 ("1907 Act"), ch. 2911, § 2, 34 Stat. 1287 (emphasis added). As originally drafted, § 16 of the Enabling Act directed the transfer of all cases in which the United States was a party to the new federal courts. 34 Stat. 276. But because the United States was a party in all criminal prosecutions in Indian Territory, some members of Congress feared that § 16 could be read to transfer all criminal cases in Indian Territory to federal court. *See* S. Rep. 59-7273 (Feb. 23, 1907); H.R. Rep. 59-8103 (Feb. 26, 1907).

Congress therefore amended the Enabling Act to provide that civil cases in which the United States was a party would be transferred to federal court along with other federal cases, and included new language specifically providing for the transfer of criminal cases to federal court only in cases involving federal crimes—not cases involving local crimes that had been prosecuted by the United States prior to statehood. 1907 Act § 1, 34 Stat. 1286–87. Congress also amended §§ 17 and 20 to reiterate that "all causes, proceedings, and matters, civil or criminal" pending in the territorial courts *not* transferred to the

federal courts under § 16 were transferred to the state successor courts. 1907 Act § 2, 34 Stat. 1287.

In short, the text and statutory history of the 1907 amendments confirm congressional intent to transfer all civil and criminal cases of a local nature to state court. If the Oklahoma-specific jurisdiction-conferring provisions of the 1897, 1898, 1904, 1906, and 1907 Acts supersede § 1153's general direction that federal courts have jurisdiction over major crimes involving Indians on "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," 18 U.S.C. § 1151(a), those same provisions likewise supersede other generally applicable laws that purport to exclude state civil jurisdiction over reservations defined in § 1151.

3. The contemporaneous history confirms the text: Congress erased any distinction between Indians and non-Indians in the former Indian Territory, and later Oklahoma, for purposes of both civil and criminal jurisdiction. In originally extending Arkansas law to all persons in Indian Territory regardless of race, Congress ensured that "[Indian] criminals shall be tried the same as the white men who are now in the territory." 29 Cong. Rec. 2324 (Sen. Berry). The same was true for civil cases. Federal courts would now "decide all the causes that arise between the Indians, as well as between Indians and white men," and "decide all causes of every description ... according to the laws of the United States and the laws of the State of Arkansas extended over [the Indian] Territory." 29 Cong. Rec. 2341 (Sen. Vilas). The 1897 Act took away the tribes' "exclusive jurisdiction, where Indians alone are concerned, in both criminal and civil suits ... and g[ave] it exclusively to the white man." 29 Cong. Rec. 2310 (Sen. Bate); *see also* 29 Cong. Rec. 2305 (Sen. Vest) ("I would put the

Indians in the Territory under the same laws with the white people."). This purpose was reflected throughout the statehood process. *See* Br. 12, 30–31. For example, unlike in other states, the Enabling Act gave Indians in the former Indian Territory full rights to participate in Oklahoma's constitutional convention and granted them equal civil and political rights. §§ 2–3, 34 Stat. 268–69; *United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909).

Upon statehood, civil and criminal cases involving Indians were treated identically—Oklahoma courts assumed jurisdiction over such cases. As discussed, criminal cases involving Indians were transferred from federal territorial courts to state court. Br. 39–43. The same was true for civil cases. *E.g.*, *Sweet v. Schock*, 245 U.S. 192 (1917) (affirming state-court decision holding county could tax former allotments sold for townsite purposes); *Brady v. Sizemore*, 124 P. 615 (Okla. 1912); *Gann v. Ball*, 110 P. 1067 (Okla. 1910). And post-statehood, Oklahoma courts immediately considered all civil cases involving Indians and applied state law. *See, e.g.*, *Barnett v. Gross*, 216 P. 153 (Okla. 1923) (contract dispute involving Indian defendant); *Carroll v. Durant Nat'l Bank*, 133 P. 179 (Okla. 1913) (contract suit involving Indian defendant); *Swofford Bros. Dry Goods Co. v. Owen*, 133 P. 193 (Okla. 1913) (shareholder suit involving at least one Indian defendant).[2] And this Court routinely reviewed the decisions of Oklahoma courts,

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[2] The opinion in *Barnett* notes the tribal membership of the defendant. 216 P. at 153. The names of defendants in *Carroll* and *Swofford Bros. Dry Goods Co.* (defendant J. Hamp Willis) appear on the Dawes Rolls. *See* Oklahoma Historical Society, *Search the Dawes Final Rolls and Applications*, www.okhistory.org/research/dawes.

applying Oklahoma law, involving heirship disputes. *See supra* p. 4.

In short, Congress spent a decade erasing any distinction between Indians and non-Indians, for both civil and criminal matters. Members of the Five Tribes "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 603 (1943). Congress did not radically change course upon statehood and reinstate distinctions based on Indian status in criminal prosecutions and civil disputes in Oklahoma.

4. Notwithstanding the foregoing analysis, the best reading of the statutory text, history, and context is that the former Indian Territory is not a group of reservations, full stop. Br. 38–46; Reply Br. 10–14; *see infra* pp. 18–19. Congress's plain and unwavering purpose—to end jurisdictional distinctions between Indians and non-Indians in eastern Oklahoma—confirms that it did not intend the area to be reservation land.

Any notion that the Five Tribes are treating eastern Oklahoma as consisting of reservations today, that their present powers could be diminished by reversal, or that there could be backsliding with respect to current services offered by the Five Tribes is false and misleading. We fail to understand how any "significant practical disruption" could result from acknowledging the absence of a reservation. Oral Arg. Tr. 63:1–5. Tribes can continue to render whatever services they want to their members (or to nonmembers) anywhere in Oklahoma. Counsel for the Creek Nation stated at oral argument that, with respect to "[t]he Creek's providing healthcare, educa-

tion, infrastructure," "a disestablishment would snuff all that out." Oral Arg. Tr. 73:25–74:3. This statement is simply not true. The Creek Nation offers all these services to members despite the absence of a reservation. None of the healthcare, education, or infrastructure services the Creek Nation currently provides, nor funding for such services, stems from any recognition of a current reservation coextensive with the Creek Nation's 1866 boundaries.

Indeed, the Creek Nation often receives federal funding for these services precisely because they qualify as a tribe with a *former* reservation in Oklahoma. For example, while it is true that the Creek Nation assists with maintenance of some state- or county-owned roads (typically ones that service tribal facilities such as casinos) pursuant to agreements with state or local entities and funded by federal grants, Oral Arg. Tr. 55:6–10, they do so under federal programs made available for roads located "in *former* Indian reservations in the State of Oklahoma." 23 U.S.C. § 202(b)(1)(B)(v) (emphasis added); 25 C.F.R. § 170.5; *see also, e.g.*, 25 U.S.C. § 1603(16)(B)(i)–(ii) (defining "reservation" to include "former reservations in Oklahoma" for purposes of Indian Health Care Act); § 3202(9) (same with regard to child protection and family violence prevention); § 2020(d)(1)–(2) (same with respect to education); § 1452(d) (same with regard to economic development); § 4302(4)(A)–(B) (same with regard to business development and trade promotion); 33 U.S.C. § 1377(c)(3) (same with regard to water pollution prevention and control). None of these programs could possibly be affected by recognizing the status quo—that there are no current reservations in eastern Oklahoma.

The Creek Nation is also wrong to claim that disestablishment could jeopardize tribal policing "pursuant to ... cross-deputization agreements." Oral Arg. Tr. 73:23–74:3. These agreements developed in the wake of judicial decisions in the late 1980s and early 1990s holding that the State lacked jurisdiction over restricted allotments and tribal trust lands, thereby creating a "checkerboard" of federal, state, and tribal jurisdiction. *See United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992); *see also* Reply Br. 12. To avoid jurisdictional disputes on these parcels scattered throughout the former Creek territory (the status of which may be difficult to determine at the time of arrest), the tribes, state and local entities, and federal authorities have entered into cooperative agreements to give all law enforcement officers within the former Creek territory jurisdiction on any given parcel, regardless of whether it is Indian country. *See, e.g.*, Cross-Deputization Agreement Among Hughes County, Oklahoma, the Bureau of Indian Affairs, and the Muscogee (Creek) Nation of Oklahoma (1995), https://bit.ly/2LAHEDd. Thus, it is precisely because everyone has recognized that the entire area is *not* uniformly reservation land, but instead contains a patchwork of isolated pockets of Indian country, that the cross-deputization agreements are useful and expedient. By their plain terms, these agreements will not be affected by a holding that the area is not reservation land.

Nor are we aware of any basis for the implication that Creek tribal courts have been exercising jurisdiction over non-Indians or non-Indian lands extending to their 1866 boundaries since 1936. Oral Arg. Tr. 75:3–14. The Creek courts were not reinstated until the early 1980s, and since then, the courts have purposefully declined to decide whether the tribe

may assert such jurisdiction. *See Muscogee (Creek) Nation ex rel. Beaver v. Am. Tobacco Co.*, No. CV-97-27, 1998 WL 1119774, at *7 (Muscogee (Cr.) D. Ct. Feb. 12, 1998).[3]

Finally, a ruling that the area is not reservation land would preserve the status quo with respect to restricted allotments, over which the federal government since 1992 has exercised criminal jurisdiction in cases involving Indian defendants or victims. U.S. Br. 32–33. If this Court holds that the State has criminal jurisdiction over Indians regardless of whether the area is "an Indian reservation" for purposes of §§ 1151(a) and 1153, federal prisoners will inevitably argue that this Court's holding applies equally to restricted allotments, notwithstanding § 1151(c). Thus, ruling on the alternative grounds suggested in this first question risks undermining the convictions of many federal prisoners who are tribal members or who committed their crime against Indians on restricted allotments or trust lands. And because, as discussed above, this conclusion applies equally to civil and criminal jurisdiction, such a holding may also undermine federal and trib-

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[3] Contrary to the representation of counsel for the Creek Nation that, since 2000, the Creek Nation has been carrying out law enforcement and other activities in "almost the entire area" in dispute in this case, Oral Arg. Tr. 74:10–23, the Creek Nation's own Executive Branch quarterly report recognizes that this case "has the potential to expand MCN jurisdiction within the tribe's 11-county borders." Muscogee (Creek) Nation Executive Branch FY 2018 First Quarterly Report (Jan. 22, 2018), at 23, https://bit.ly/2LFcY3S. If the decision below is upheld, that result could require the Creek Nation to "triple the size of Lighthorse staff and officers in addition to associated impacts on facilities, equipment, administrative support and training." *Id.* at 24.

al authority currently exercised on restricted allotments and trust lands.

In other words, it is far from certain that an affirmative answer to this Court's first question would be a narrower result than the recognition that the Creek Nation's former territory is not an Indian reservation today. On the contrary, in the criminal arena, such a ruling would arguably be broader than a holding that the area is not an Indian reservation, as it would open the door to litigation by defendants challenging the federal government's jurisdiction over crimes committed on restricted allotments. On the civil side, the implications of leaving unanswered the reservation status of eastern Oklahoma would—at a minimum—create confusion and disarray, as explained below. And a holding that the Oklahoma-specific grants of state jurisdiction supersede 18 U.S.C. § 1153's application to lands defined in § 1151 could suddenly throw into question the jurisdictional treatment of cases generally thought to be within tribal jurisdiction in the civil context, such as disputes between Indians on tribal trust lands or restricted allotments.

5. Before the decision below, not *once* in Oklahoma's 111-year history had any court—federal, state, or tribal—recognized a reservation in the former Indian Territory. Let there be no mistake: neither respondent, nor the Creek tribe, nor any amici question that affirmance would increase the total amount of reservation land nationwide by 28.3% and *triple* the total population of reservations in the United States. America's largest city encompassed by a reservation would no longer be Fife, Washington, population: 9,173; it would be Tulsa, Oklahoma, population: 403,090.

Thus, while reversal in this case preserves the status quo for both the State and the Five Tribes and allows settled expectations to remain undisturbed, leaving open the question whether eastern Oklahoma consists of Indian reservations within the meaning of § 1151(a) would invite significant uncertainty and litigation. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 427 n.2 (1975).

For example, states generally cannot collect income taxes from tribal members who live and work in Indian country. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). States similarly cannot collect sales or other excise taxes from tribal members for transactions on reservations, at least where the legal incidence of the tax falls on the tribe or tribal members. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). Because around 10% of the population in this area identifies as Native American, leaving open whether the area constitutes Indian reservations threatens to decimate state and local budgets and the services they fund. Meanwhile, other transactions, including those involving non-Indians, would be subject to a multifactor balancing test to determine whether the State may tax. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980).

That is not all. At least ten criminal statutes in Title 18 refer to Indian country under § 1151, five of which could expose the 1.8 million eastern Oklahomans to new federal criminal prohibitions. *See* 18 U.S.C. § 1164 (destroying boundary signs); § 1460 (sale of obscene matter); § 2252 (exploitation of mi-

nors); § 2252A (child pornography); § 2261 *et seq.* (domestic violence).[4]

Additionally, restaurants, bars, and stores selling alcohol in eastern Oklahoma would potentially be subject to federal criminal penalties or tribal regulation for distribution or possession of liquor in a newly created Indian reservation—subject to extensive, fact-dependent litigation over whether each establishment falls on fee land in a "non-Indian communit[y]." *See* 18 U.S.C. §§ 1154, 1156, 1161. Tribal laws already set forth licensing schemes for sale of alcoholic beverages on tribal land. *See, e.g.*, Muscogee (Creek) Nation Liquor and Beverage Code, tit. 36, §§ 7-101, 7-201, 7-202 (regulating sale and possession of alcoholic beverages in "Muscogee (Creek) Nation Indian Country as defined by federal law"). And the Five Tribes could operate casinos on any land within their 1866 boundaries that is subject to tribal jurisdiction. *See* 25 U.S.C. §§ 2703(4), 2710 (Indian Gaming Regulatory Act applies to "all lands

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[4] *See also* 18 U.S.C. § 2265(e) (granting tribal courts civil jurisdiction to issue and enforce protective orders in domestic-violence cases arising in Indian country); § 2345 (forbidding civil actions by state attorneys general to enforce tobacco-trafficking prohibition against tribes or Indians in Indian country); § 3559(c)(96) (creating exception to mandatory life imprisonment for certain offenders where federal jurisdiction over the offense was predicated only on Indian country jurisdiction, unless tribe elects to have the mandatory rule apply); § 3598 (similar with respect to capital sentences); § 5032 (similar with respect to federal procedures governing juvenile delinquency). It is far from clear whether and how these (and potentially other) statutes might apply if this Court declines to determine whether the entire former Creek territory is a reservation.

within the limits of an Indian reservation" within the tribe's jurisdiction).[5]

At least two dozen other federal statutes refer to Indian country, within the meaning of 18 U.S.C. § 1151, for civil and criminal purposes.[6] More than 100 other civil and criminal provisions of the U.S. Code, many of which affect the daily lives of citizens, refer to the term Indian "reservation."[7]

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[5] Counsel for the Creek Nation stated at oral argument that affirmance "would not" expand IGRA's reach "in the sense that there is a compact in place between the nation and the state already." Oral Arg. Tr. 72:13–18. But the gaming compact between the Creek Nation and the State of Oklahoma authorizes tribal gaming on all Indian lands as defined in 25 U.S.C. § 2703(4), the scope of which would be significantly broadened if the Court holds that eastern Oklahoma comprises a group of reservations. Tribal Gaming Compact Between the Muscogee (Creek) Nation and the State of Oklahoma, pmbl. & Part 5(L) (Feb. 4, 2005), https://bit.ly/2Q3a3Cv.

[6] Here are six examples: 6 U.S.C. §§ 606, 601(4)(A)(iii)(IV) (authorizing homeland-security grants to tribes "the jurisdiction of which includes not less than 1,000 square miles of Indian country"); 15 U.S.C. § 1175(a) (prohibiting manufacture, transport, or use of gambling devices within Indian country, except for gaming conducted under Tribal-State compact, *see* 25 U.S.C. § 2710(d)(6)); 15 U.S.C. § 1245 (forbidding possession, manufacture, or sale of ballistic knives in Indian country); 16 U.S.C. §§ 3372(a)(1), 3371(c) (prohibiting import or sale of fish or wildlife taken in violation of any tribal rules enforceable "within Indian country"); 21 U.S.C. § 387t(c) (creating exception to FDA's ability to direct tobacco-related record inspections "on Indian country" absent tribal consent); 25 U.S.C. § 1304(c) (allowing tribes to exercise "special" criminal jurisdiction over certain acts of domestic violence occurring "in the Indian country of the participating tribe").

[7] 42 U.S.C. § 2000e-2(i) exempts from federal antidiscrimination laws "any business or enterprise on or near an Indian reservation" that preferences "an Indian living on or near a reser-

One statute bears special focus given the breathtaking consequences of leaving open whether half of Oklahoma consists of Indian reservations. The Indian Child Welfare Act provides exclusive tribal-court jurisdiction over child welfare determinations where an Indian child is domiciled or resides on a reservation, *even if every party objects*. 25 U.S.C. § 1911(a). ICWA further allows any tribe, parent, or Indian child to petition to invalidate a final decision for foster placement or termination of parental rights on the basis that the state court lacked jurisdiction. *Id.* § 1914. Thus, in *Mississippi Band of Choctaw Indians v. Holyfield*, this Court invalidated an adoption *three years* after the fact because the adoption pro-

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vation." Other examples include 7 U.S.C. § 1926(a)(1) (authorizing loans to "Indian tribes on Federal and State reservations" for purpose of improving water and waste practices); 15 U.S.C. § 6312(b)(1) (allowing tribes to "regulate professional boxing matches held within the[ir] reservation[s]"); 16 U.S.C. § 3378(c)(3) (federal fish-and-wildlife controls do not supersede State or tribal authority over activity "within Indian reservations"); 18 U.S.C. § 1853 (prohibiting destruction of trees growing "upon any Indian reservation" without consent of United States); 25 U.S.C. § 318a (appropriation of funds for construction and maintenance of "[r]oads on Indian reservations"); 25 U.S.C. § 381 (authority to regulate irrigation of lands within any Indian reservation for agricultural purposes); 25 U.S.C. § 1680n(b)(1) (giving priority to "Indian lands," including "all lands within the limits of any Indian reservation," for the establishment of certain facilities and employment projects); 26 U.S.C. § 4225 (tax exemption for certain crafts "manufactured or produced by Indians on Indian reservations"); 43 U.S.C. § 315 (forbidding creation of grazing districts on Indian reservations); 49 U.S.C. § 47123(b)(1)(B) (preferential employment of Indians living on or near a reservation for projects or contracts at an airport on an Indian reservation); and 52 U.S.C. § 10503(b)(2)(A)(i)(III) (bilingual election requirements "in the case of a political subdivision that contains all or any part of an Indian reservation").

ceedings took place in state court, not tribal court. 490 U.S. 30, 53 (1989).

Between July 1, 2017, and June 30, 2018, 2,010 Native American children in Oklahoma were placed outside the home in foster care; of those, 1,032 placements were adjudicated in eastern Oklahoma and may be subject to challenge under ICWA, including 284 placements in Tulsa alone. Okla. Dep't of Human Servs., *Fiscal Year 2018 Annual Report Tables*, tbl.15, https://bit.ly/2SG7Y0S. Another 184 to 923 Native American children statewide were adopted in adjudicated proceedings. *Id.* tbl.16 (listing adoptees that are "American Indians" or "two or more races"). Leaving open whether eastern Oklahoma is a reservation would unsettle the security of every child and family involved in these cases—and countless others from prior years.

II. Federal Indian reservations are Indian country under 18 U.S.C. § 1151(a).

The Court also directed the parties to address: "Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a)." The answer is no.

1. Section 1151(a), titled "Indian country defined," provides that "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" is Indian country. We do not see how the Five Tribes could have formal reservations that fail to meet the definition of Indian country set forth in § 1151(a). This provision is a definition, and it expressly defines "Indian country" to include "any Indian reservation under the jurisdiction of the United States Government." "[R]ead naturally, the word 'any' has an expansive meaning, that

is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

The modifying phrase "under the jurisdiction of the United States Government" does not lead to a different conclusion. That phrase clarifies that only reservations under federal protection qualify as "Indian country" under § 1151(a). Felix S. Cohen, *Handbook of Federal Indian Law* § 3.04[2][c][ii] (2017 ed.); *see also* § 3.02[9] (distinguishing state-recognized tribes and reservations). Oklahoma has never created an Indian reservation under state law, and the Creek Nation asserts only a federal reservation that Congress set aside for them by treaty. Creek Br. 4; *see also* Resp. 6.

2. Moreover, it is not clear what it would mean to say that land is a formal federal Indian reservation but somehow not Indian country under § 1151(a). Both terms describe land over which the federal government and the tribes, not states, generally exercise primary jurisdiction. *See Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1, 530 (1998). The decision below explained that "[t]he term Indian reservation has come to describe federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction." Pet. App. 28a (brackets and citation omitted). Other forms of Indian country—such as allotments and tribal trust lands—likewise are characterized by tribal and federal jurisdiction with corresponding limits on state jurisdiction. *E.g.*, *Native Vill. of Venetie*, 522 U.S. at 530; *Sac & Fox Nation*, 508 U.S. at 124–126; *United States v. Ramsey*, 271 U.S. 467, 471 (1926).

In other words, the term "Indian reservation" has significance only to the extent it is a basis for tribal or federal jurisdiction over non-Indian-owned land, to the general exclusion of state jurisdiction. That is why this Court's disestablishment cases distinguish an Indian reservation from land over which a tribe cannot exercise sovereignty or jurisdiction because Congress has "divested [it] of all Indian interests." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).[8] Because surplus land acts, by definition, extinguish Indian *title* to the land, the only other Indian "interest" at stake is *sovereign* interest over non-Indian-owned land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (savings clause did not "maintain exclusive tribal governance within the original reservation boundaries"); *id.* at 352–53 (tribe understood that congressional act "dissolved tribal governance"); *Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016) (citing this language from *Yankton Sioux*); Br. 32. Although after statehood the Five Tribes existed and retained some control over internal governance and disbursement of assets, the Five Tribes had no power over non-Indian owned *land*, nor did they attempt to exercise any. Reply Br. 2–10.

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[8] *See also Solem*, 465 U.S. at 469 n.10 (searching for text that "severed the tribe from its interest" in non-Indian owned fee land); *id.* at 470 ("Explicit reference to cession or other language evidencing the present and *total surrender of all tribal interests* strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.") (emphasis added); *id.* at 474 ("Nowhere else in the Act is there specific reference to the cession *of Indian interests in the opened lands* or any change in existing reservation boundaries.") (emphasis added); *id.* at 478 ("complete cession of tribal interests" in non-Indian owned fee land and "cede and relinquish all interests" in such land).

This Court's questions envision a scenario in which Congress may have preserved a reservation while vesting the State with plenary jurisdiction to the exclusion of the tribes and the federal government. But land that Congress has divested of tribal title, jurisdiction, and sovereignty, and of federal authority, is no longer a reservation. By extinguishing the territory's reservation-like status (in the jurisdictional sense), Congress not only ousted tribal jurisdiction—and introduced state jurisdiction—over non-Indian-owned lands within that area, it also ousted federal jurisdiction and supervision over those lands. It would be confusing and disruptive for such lands still to be denominated a "reservation." The federal government has always agreed with Oklahoma that the former Indian Territory lost any reservation status after statehood. And in none of this Court's other disestablishment cases did Congress dismantle tribal sovereignty in a manner commensurate with its decades-long campaign to dissolve the Five Tribes' territory and jurisdiction to make way for a new State.

3. Finally, were this Court to hold that the Five Tribes have Indian reservations that are not Indian country under § 1151(a), it would be venturing into uncharted territory. No precedent exists for such a concept, and it is unclear what rules would apply to a "non-§ 1151(a) federal reservation" outside the criminal context. At a minimum, the creation of this new concept would lead to uncertainty and litigation in the civil arena. Myriad statutes apply to the term "reservation" alone. *See supra* n.6. Accordingly, even were eastern Oklahoma not "Indian country," reservation status would leave the 1.8 million residents of eastern Oklahoma potentially subject to a host of new statutory and regulatory requirements, and

would impose significant new burdens on the federal government.

CONCLUSION

The decision below should be reversed.

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Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

(2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).

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INTRODUCTION

If the Creek reservation endures, then it is "Indian country," and the federal government has exclusive jurisdiction to prosecute major crimes involving Indians on the reservation. The relevant statutes foreclose, in their text, any other result.

The Court's first Supplemental Question tees up the argument made by the Solicitor General, an argument "frequently raised, but never accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992). The consensus is correct. The Major Crimes Act applies to "any State," with no textual exception for Oklahoma. And while Congress has transferred criminal jurisdiction to States repeatedly over the years, it has always done so unambiguously. That is as it should be. Jurisdiction over Indians on reservations is a traditionally federal domain, stemming from the federal government's "plenary power" over Indian affairs "drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Clarity thus is essential before this Court concludes that Congress has taken federal jurisdiction and given it to States. Such clarity is absent here. Indeed, the text of the relevant statutes confirms that the Major Crimes Act applied in Oklahoma after statehood, as it applied in every other State. The United States' contrary argument reflects the same approach to statutory construction—based on storytelling, not text—that the State and the United States invoked to address disestablishment.

Nor does the Court's second Supplemental Question provide an alternative path to State criminal

jurisdiction. Section 1151(a) defines "Indian country" to include "any reservation under the jurisdiction of the United States Government." That definition excludes reservations established and recognized only by States. But when Congress establishes a reservation, it is under federal jurisdiction, and remains Indian country, until Congress says otherwise. The Executive Branch cannot change that. For the same reasons that only Congress can disestablish a reservation that Congress has established, only Congress can remove from the "jurisdiction of the United States Government" a reservation that Congress placed under that jurisdiction. That rule applies with particular force here, where Congress *rejected* proposals of the Executive Branch that would have removed the Creek reservation from the jurisdiction of the United States, leaving it to "be controlled by the new State." 40 Cong. Rec. 2977 (1906) (Sen. McCumber); *see* Resp. Br. 13, 42. Any alternative approach would embroil courts in disruptive, reservation-by-reservation litigation to decide whether a particular reservation is sufficiently under "the jurisdiction of the United States Government" to remain Indian country.

Regardless, no answer to the Supplemental Questions permits the Court to reverse the Tenth Circuit's decision *in this case*. The Court cannot uphold Respondent's capital sentence based on arguments the State never raised and—indeed—disavowed. So while an affirmative answer to one or both Supplemental Questions might limit relief for other defendants, the Tenth Circuit's decision here must stand.

ARGUMENT

I. The Court May Not Uphold Respondent's Death Sentence Based On Arguments The State Has Disavowed.

Regardless of the Court's answers to the Supplemental Questions, or the impact on other defendants, the Tenth Circuit's judgment must be affirmed. The State failed to preserve any argument besides its disestablishment argument, and it *disavowed* the argument that it could exercise criminal jurisdiction even if the Creek reservation endured. In the Tenth Circuit, the State relied on disestablishment alone to argue that Respondent's "conviction must stand." State 10th Cir. Br. 94. At the petition stage, the State raised no additional argument, even when the United States offered alternative grounds for reversal. Then, in its opening merits brief, the State contended that "[i]f the territory of the Creek Nation were a reservation, ... none of the[] convictions" obtained by state courts for qualifying crimes after 1907 "would have been valid." Pet'r Br. 43. And in reply, the State doubled down: After noting the argument that "Oklahoma had jurisdiction to try Indians in the former Indian Territory even if the area were one giant reservation," the State reaffirmed that "Oklahoma has not pressed that argument." State Reply 13.

Holding the State to its litigation choices is particularly appropriate here. First, its disavowal was intentional and express. Oklahoma not only disclaimed alternative arguments but provided three reasons for doing so. *Id.* at 13-14. Second, and more important,

Oklahoma's disclaimer reflected a tactical judgment to try to *prevent* the Court from reaching a "compromise," such as holding that Oklahoma retained criminal jurisdiction while leaving the reservation question for later. *See id.* (noting such a holding "would do nothing to ameliorate uncertainty caused by the decision below"). Having made the tactical judgment to invoke solely its reservation argument, Oklahoma cannot now claim entitlement to execute Respondent based on arguments it abandoned.

II. No Statute Gives Oklahoma Jurisdiction To Prosecute Indians For Crimes On Reservations.

The United States has long argued that Congress granted "Oklahoma jurisdiction over the prosecution of crimes committed by Indians" in Eastern Oklahoma, "irrespective of ... reservation status." Order 1; *see* U.S. Merits Br. 28-33. But for decades, courts have rejected that argument.[1] For good reason. Echoing the State's reliance on the "'overall thrust' of congressional action" to analyze disestablishment, Pet'r Br. 52, the United States asks the Court to infer a shift of jurisdiction away from the federal government and to the State based on four statutes it deems "especially significant," U.S. Merits Br. 28, even though no text effects that result.

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[1] *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 81 & n.17 (Okla. 1985); *see Sands*, 968 F.2d at 1061-63. Although these cases concerned restricted allotments, nothing in the United States' theory distinguishes restricted allotments from reservation lands.

That nontextual approach is wrong for disestablishment, and wrong for jurisdiction.

A. When Congress Subjects Reservations To State Jurisdiction, It Speaks Clearly.

States generally lack jurisdiction to prosecute crimes concerning Indians on reservations. *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016). That rule derives from at least two sources. First is the "deeply rooted" principle that Indians on reservations are "free from state jurisdiction and control." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (quotation marks omitted). Second is the jurisdiction Congress has conferred on the *federal* government in statutes like the Major Crimes Act and General Crimes Act, as a manifestation of the "federal guardianship" over Indian tribes, *United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977), and the federal government's "plenary power" over "the special problems of Indians," *Morton*, 417 U.S. at 551; *see United States v. John*, 437 U.S. 634, 651 (1978). As elsewhere, Congress can take away the federal government's jurisdiction and abrogate tribal rights—but only if "Congress has expressly provided" as much. *McClanahan*, 411 U.S. at 170-71.

Hence, when Congress transfers criminal jurisdiction to States, its statutes are bell-clear. In 1940, Congress did so in Kansas, enacting what this Court described as "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993).

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations ... to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State....

Id. (quoting Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243)). Statutes with near-identical language quickly followed for North Dakota, Iowa, New York, and California's Agua Caliente reservation. *See* Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. Thereafter, Congress did the same thing in gross in Public Law 280, granting exclusive criminal jurisdiction to six more States (California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska) and giving any *other* State the option to assume such jurisdiction. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162) ("Pub. L. 280").[2] Congress again left nothing to guesswork, specifying that each State "shall have jurisdiction over offenses committed by or against Indians in [designated] areas of Indian country." *Id.* § 2. Congress thus knew exactly how to do what the United States *says* Congress did in Oklahoma.

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[2] A 1968 amendment made subsequent assumptions of jurisdiction subject to tribal consent. Pet. App. 72a.

B. Congress Did Not Subject Eastern Oklahoma's Reservations To State Criminal Jurisdiction.

The United States' theory is that, notwithstanding *Negonsott*, Congress in 1906 in fact gave Oklahoma the "first major grant" of criminal jurisdiction over reservations. The text, however, says otherwise.

The Major Crimes Act is unambiguous. At statehood, the Act applied without exception to provide federal jurisdiction—"pre-emptive of state jurisdiction," *John*, 437 U.S. at 651—over qualifying crimes "commit[ed] ... within the boundaries of any State of the United States" and "within the limits of any Indian reservation." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. The General Crimes Act, too, applied in Oklahoma's "Indian country." Rev. Stat. § 2145; *see United States v. Ramsey*, 271 U.S. 467, 469 (1926) (federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before," including "under section 2145").

Hence, the United States must show that some *other* statute repealed the Major Crimes Act (and General Crimes Act) as to Oklahoma. But Congress knows how to transfer federal criminal jurisdiction to the States, *supra* 5-6, and no such clear language appears in any of the statutes the United States identifies.

Start with the Enabling Act. Had Congress repealed the Major Crimes Act and eliminated federal criminal jurisdiction in the State of Oklahoma, the Enabling Act was the place to do it. But far from treating Oklahoma

differently than any other State, it treated Oklahoma *the same*.

As to pending cases, Congress specifically amended the Enabling Act to confirm that Oklahoma would be like all other States: "[p]rosecutions for all crimes and offenses committed within the ... Indian Territory ... *which, had they been committed within a State, would have been cognizable in the Federal courts*, shall be transferred to and proceeded with in the United States circuit or district court." Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286, 1287 (emphasis added). Hence, the criminal jurisdiction of courts in the new State "was to be the same [as if] the Indian Territory [had] been a State when the offenses were committed." *S. Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916).

Likewise, for new cases, nothing in the Enabling Act repealed the Major Crimes Act (or the General Crimes Act) in Eastern Oklahoma. *Cf.* U.S. Merits Br. 31 ("repeals by implication are not favored" (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)). Far from giving Oklahoma uniquely broad jurisdiction, the Enabling Act's text preserved the divisions between state and federal jurisdiction that applied everywhere.

That is clear, first, from Section 13, on which the United States principally relies. The United States suggests the Enabling Act "extended the territorial laws in force in the Oklahoma Territory over the entire State," including Indian reservations. U.S. Merits Br. 29. But that is not what Section 13 does. Instead, when

Congress applied "the laws in force in the Territory of Oklahoma" as the default law for the new State, it did so with the caveat—ignored by the United States—that Oklahoma territorial law governed only "as far as applicable." Act of June 16, 1906, ch. 3335, § 13, 34 Stat. 267. This caveat practically shouts that Congress was not extending state law to anywhere it normally would *not* apply, including crimes concerning Indians on reservations. Indeed, the language the United States cites in the Enabling Act is the same language Congress used in the enabling act for Montana, Washington, North Dakota, and South Dakota, which provided that the default post-statehood law would be the "laws in force made by said Territories." Act of Feb. 22, 1889, ch. 180, § 24, 25 Stat. 676, 683. No one has ever thought this provision transferred to States criminal jurisdiction over Indian crimes on reservations. *Cf. Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 352 (1962) (Major Crimes Act prosecution in Washington).

The Enabling Act's other provisions confirm the point. Section 1 forbade Oklahoma's constitution from "limit[ing] or impair[ing] the rights of person or property pertaining to the Indians," or from limiting federal authority "to make any law or regulation respecting such Indians, their lands, property, or other rights." This Court interpreted that caveat to preserve not just forward-looking power, but "established [federal] laws and regulations" concerning Indians. *Ex parte Webb*, 225 U.S. 663, 683 (1912); *see Ramsey*, 271 U.S. at 469; *see also Sands*, 968 F.2d at 1062 (chiding the government's "construction of the Oklahoma Enabling

Act" as "ignor[ing] § 1"). Then, Section 3 required Oklahoma to "forever disclaim all right" to "all lands ... owned or held by any Indian, tribe, or nation." And finally, Section 21 confirmed that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States." These are not the words of a statute that, for the first time, shifted criminal jurisdiction over reservations from the federal government to States.[3]

Now consider the pre-statehood enactments. They did not provide that *if* the Indian Territory became a State, the new State would be exempt from the Major Crimes Act and its exclusive federal jurisdiction over reservations in "any State." To contend otherwise, the United States relies on the extension of "Arkansas law" in the Indian Territory to all persons "'irrespective of race.'" U.S. Merits Br. 28-29 (quoting Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act")). But for two reasons, that does not support the United States' position.

First, even insofar as Congress made this Arkansas law applicable to Indians, that is nothing like subjecting Indians on reservations to *state* jurisdiction. Congress merely identified "Mansfield's Digest of the Statutes of Arkansas" as the rules to apply as "incorporated"

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[3] Reinforcing this point, the Senate Report to Public Law 280 identified, as a "legal impediment[] to the transfer of jurisdiction over Indians on their reservations," the state constitutional provisions required by these enabling act disclaimers (including for "Oklahoma"). S. Rep. No. 83-699, at 7 (1953), *as reprinted in* 1953 U.S.C.C.A.N 2409, 2414.

"federal law." *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 & n.3 (10th Cir. 1987); *see* Act of May 2, 1890, ch. 182, § 33, 26 Stat. 81 ("1890 Act"). These criminal laws were chosen by Congress, were enforced by prosecutions "in the name of the 'United States,'" 1890 Act § 32, and were adjudicated in "United States Courts" created and controlled by Congress, *S. Surety*, 241 U.S. at 584; *see* 1897 Act, 30 Stat. at 83. That is far from subjecting Indians on reservations to *state* legislatures, prosecutors, and courts.

Second, the United States implies that when Congress directed the application of Arkansas law, it *displaced* federal laws. Not so. When Congress gave the pre-statehood courts jurisdiction "irrespective of race," it empowered them to apply two sets of laws: "*the laws of the United States* and the State of Arkansas in force in the Territory." 1897 Act, 30 Stat. at 83 (emphasis added). If general federal law and Arkansas law defined the same offense, federal definitions "govern[ed]." 1890 Act § 33.

The United States fares no better by suggesting that the abolition of *tribal* courts in 1897, in favor of "United States Courts" established by the federal government, somehow eliminated *federal* jurisdiction and transferred it to Oklahoma in 1907. U.S. Merits Br. 28-29. That argument mistakenly assumes that Congress's actions against the *Nation* somehow divested jurisdiction from the *federal government*. But federal Indian law from the start reflected a desire to aggregate tribal power *and* federal power to insulate tribes from the pressures of

(often hostile) States. *See, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting federal government's "duty of protection" over Indians from "the people of the states ... [who] are often [the tribes'] deadliest enemies"). It is a nonsequitur to view a reduction of *tribal* authority as transferring *federal* authority.

Finally, the United States' assertion of a jurisdictional gap—that tribal courts were not available to prosecute minor Indian-on-Indian crimes—says nothing about congressional intent. As Respondent has explained, tribal courts nationwide were often absent or ineffective, yielding the same gap. Resp. Br. 48-49. That problem, when identified, was solved by BIA courts, *see id.*, or express jurisdictional transfers—like the Kansas Act, which Congress enacted when informed that there were "no tribal courts," and that Kansas was prosecuting "all minor offenses" in prosecutions of doubtful "legality." S. Rep. No. 76-1523, at 2 (1939). Similar gaps motivated the transfers in North Dakota, Iowa, and New York. H.R. Rep. No. 79-2032, at 2 (1946); H.R. Rep. No. 80-2356, at 1, 3 (1948); *Hearings on S. 1683 Before S. Subcomm. on Interior and Insular Affairs*, 80th Cong., 2d Sess. 3 (1948). The solution was not to judicially imply wholesale transfers of criminal jurisdiction from the federal government to the States.

C. Post-Enactment Prosecutions Cannot Revise Jurisdictional Lines Congress Drew.

The United States claims that Congress *must* have intended to shift jurisdiction to Oklahoma because "state

courts regularly exercised that jurisdiction," without objection from the federal executive. U.S. Merits Br. 32. But this *Solem* Step 3 evidence fails to persuade in the disestablishment analysis, and it is no more persuasive in jurisdictional garb. Just as only Congress can disestablish, only Congress—not unnamed state and federal officials—can transfer criminal jurisdiction from the federal government and tribes to the States.

To the extent the United States claims these prosecutions shed light on *Congress's* intent, this post-enactment evidence—never a sound guide to statutory meaning—is especially unpersuasive because, in this era, States nationwide routinely exercised criminal jurisdiction over Indian reservations that Congress never conferred. Kansas exercised "jurisdiction over all offenses committed on Indian reservations." *Negonsott*, 507 U.S. at 106-07. Nebraska also "erroneously exercis[ed] criminal jurisdiction ... for some seventy years." Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995*, 15-17 (1999). New York, too, "regularly exercised or claimed the right to exercise jurisdiction over the New York reservations." *Cohen's Handbook of Federal Indian Law* § 6.04[4][a] at 578 (Nell Jessup Newton eds. 2012) ("*Cohen's*"). Washington and South Dakota did the same. Resp. Br. 46.

Indeed, the Department of Interior memorandum annexed to the United States' merits brief describes how, in the first half of the 20th century,

> several States had asserted civil and criminal

> jurisdiction in Indian country ..., despite the fact that no Federal statutes of relinquishment and transfer had been enacted[,] [including] Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted [sic] by certain counties in such States as Washington, Nevada, and Idaho.... Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute....

U.S. Merits Br. 7a-8a. The precise reason for this practice is unclear. In Oklahoma no case addressed the issue for three decades after statehood. But whatever the reason, with States routinely asserting criminal jurisdiction Congress never provided, the Court can infer nothing from state prosecutions on the Creek reservation.

Finally, concerns over the impact of affirmance on other convictions is misplaced. Federal habeas claims are sharply limited under AEDPA—the Tenth Circuit has already rejected attempts to file successive petitions based on "*Murphy*" claims. Br. in Opp. 33. And state courts have at least as much flexibility to limit the claims available on state collateral review. *Danforth v. Minnesota*, 552 U.S. 264, 276 (2008).[4] Thus, even were

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[4] Respondent understands that the Creek Nation intends to address this issue in greater detail.

such considerations a legitimate aspect of statutory interpretation, they would not support the United States' position.

* * *

As Oklahoma's state and federal courts have held for decades, "Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country," *Klindt*, 782 P.2d at 403, and the "enactments relied on by the [federal] government did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma," *Sands*, 968 F.2d at 1062. The Court should not now revive the United States' atextual jurisdictional theory.

III. Once Congress Establishes A Federal Reservation, It Remains "Indian Country" Under 18 U.S.C. § 1151(a) Until Congress Expressly Provides Otherwise.

Section 1151(a) defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." So an Indian reservation fails to qualify as "Indian country" *only* when it is not "under the jurisdiction of the United States Government"—for example, a *state* reservation. But reservations established by Congress are, by definition, established "under the jurisdiction of the United States Government." And they remain "under" that jurisdiction until Congress disestablishes them—because only Congress can divest land of its Indian country status. Recognizing a previously unknown

category of federal reservations that are not "Indian country" would violate § 1151(a)'s plain text, depart from this Court's precedent, unsettle established jurisdictional understandings, and enmesh courts in decades of litigation.

A. The Phrase "Under The Jurisdiction Of The United States Government" Limits § 1151(a) To Federal Reservations.

For a reservation to be "under the jurisdiction of the United States Government," it must be a *federal* reservation established by the federal government. As the leading Indian law treatise explains, the phrase "under the jurisdiction of the United States Government" "was likely added to exclude from the scope of the statute Indian reservations governed by certain states and thus not under federal protection." *Cohen's* § 3.04 at 191 (internal quotation marks omitted); *cf. Bryan v. Itasca Cty.*, 426 U.S. 373, 375-76 (1976) (describing states' limited power over "reservation Indians ... on federally established reservations"); 33 U.S.C. § 1377(h)(1) (equating "Federal Indian reservation" with § 1151(a)'s definition).

That conclusion follows from the statute's plain text. The word "jurisdiction" means the "[a]uthority of a sovereign power to govern or legislate" or "to exercise authority" or "control." *Webster's New International Dictionary* 1173 (1932); *see United States v. Rodgers*, 466 U.S. 475, 479 (1984) (the "most natural, nontechnical reading" of "jurisdiction" "is that it covers all matters confided to" an authority and all "'territory within which any particular power may be exercised'" (quotation

marks omitted)). So a reservation "under" the jurisdiction of the "United States Government" is one the federal government has placed under its "sovereign power to govern or legislate." The federal government has, by definition, done so for federal reservations. But other Indian reservations are recognized only by States. U.S. Census, State Recognized American Indian Reservations 2010 Census Block Maps, https://www.census.gov/geo/maps-data/maps/block/2010/aianhh/dc10blk_air_state.html (last visited Dec. 20, 2018). The phrase "under the jurisdiction of the United States Government" ensures that only federal reservations are "Indian country."[5]

Once Congress creates a federal reservation, however, it remains "Indian country" until Congress disestablishes it. This Court has long held that "nothing can more appropriately be deemed 'Indian country,' ... than a tract of land ... lawfully set apart as an Indian reservation." *Donnelly v. United States*, 228 U.S. 243, 269 (1913). Likewise, in *United States v. Pelican*, 232

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[5] The same conclusion follows from the phrase "tribe now under Federal jurisdiction" in the 1934 Indian Reorganization Act ("IRA"). Indian Reorganization Act § 5, 48 Stat. 984, codified at 25 U.S.C. § 5129; *see Carcieri v. Salazar*, 555 U.S. 379, 381-82 (2009). In *Carcieri*, neither the parties nor the Court questioned the federal government's interpretation that the phrase "under Federal jurisdiction" carved out tribes "under the jurisdiction of ... States." 555 U.S. at 382, 384; *see id.* at 399 (Breyer, J., concurring). The legislative history likewise shows the phrase was added to exclude members of state-recognized tribes unless they satisfied the IRA's separate blood-quantum provision. *Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 263-65 (1934); 25 U.S.C. § 5129.

U.S. 442 (1914), the Court explained that the "Colville Reservation, set apart by Executive order ..., and repeatedly recognized by acts of Congress, was a legally constituted reservation," and "[*a*]*s such* ... was included in ... 'Indian country.'" *Id.* at 445 (emphasis added) (footnote and internal quotation marks omitted). The land could lose that status, the Court continued, only if "the reservation was diminished." *Id.*

That remains the law under § 1151(a). That provision's reference to "reservations" stems from the 1885 Major Crimes Act, and the phrase "under the jurisdiction of the United States Government" first appeared in a 1932 amendment clarifying that the statute covered qualifying crimes on "rights of way running through [a] reservation." Act of June 28, 1932, ch. 284, 47 Stat. 336, 337. There is no evidence that Congress intended this phrase to dislodge this Court's understanding in *Donnelly* and *Pelican* that all still-existing reservations remain "Indian country." *Cf.* H.R. Rep. No. 72-1446 (1932) (no mention of this phrase); S. Rep. No. 72-746 (1932) (same).

Congress also did not effect that sea change when, in 1948, it borrowed the Major Crimes Act's definition as part of § 1151's codification of the "Indian country" definition. The statute's Historical and Revision Notes confirm that its definition was "based on [the] latest construction of the term by the United States Supreme Court"—citing, specifically, *Donnelly* and *Pelican*. 18 U.S.C. § 1151 note (2011); *see John*, 437 U.S. at 648 (§ 1151(a)'s "definition was based on several decisions of this Court interpreting the term"); *Alaska v. Native*

Vill. of Venetie Tribal Gov't, 522 U.S. 520, 530 (1998) (similar). In so doing, Congress embraced the "more expansive scope" of the term "Indian country" used in those cases, rather than the "more technical and limited definition" found in "[s]ome earlier" 19th-century cases. *John*, 437 U.S. at 649 n.18.

Likewise, this Court has continued to treat extant federal reservations as—by definition—"Indian country." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984) ("If the relevant surplus land act did not diminish the existing Indian reservation," then "the entire opened area is Indian country under 18 U.S.C. § 1151(a)."); *Mattz v. Arnett*, 412 U.S. 481, 506 (1973) ("We conclude that the Klamath River Reservation was not terminated ..., and that the land within the boundaries of the reservation is still Indian country, within the meaning of 18 U.S.C. § 1151."); *Seymour*, 368 U.S. at 353-54 (question was whether land is "part of an Indian reservation *and therefore* Indian country within the meaning of §§ 1151 and 1153" (emphasis added)). *Mattz* did so even though it concerned a California reservation subject to Public Law 280's transfer of federal criminal jurisdiction. 412 U.S. at 483 n.1. Indeed, Respondent has found *no* case holding that a still-existing federal reservation is not Indian country.

B. An Extant Federal Reservation Remains "Under The Jurisdiction Of The United States Government" Regardless Of Whether Federal Executive Officials Exercise Jurisdiction.

A reservation does not cease to be "under the jurisdiction of the United States Government," and hence "Indian country," simply because executive officials fail to exercise jurisdiction Congress has conferred. *Cf.* Pet'r Br. 39-42; U.S. Merits Br. 30. Such nonenforcement does not change the dispositive fact: The federal government placed the reservation under its "sovereign power to govern or legislate." *Webster's*, *supra*, at 1173. So the reservation remains "under the jurisdiction of the United States Government" until Congress disestablishes it.

Any other rule is *Solem* Step 3 by a different name. The special rules that apply to Indian reservations largely do so because reservations are "Indian country" under § 1151—a definition that governs not just criminal prosecutions, but civil jurisdiction and statutory rights. *Infra* at 23-24 & nn.7-8. So just as only Congress can disestablish, only Congress can divest land of its Indian country status.

Here, it would be particularly inappropriate to accord weight to federal executive action. When Congress preserved the Creek government (and thus the Creek reservation) in Section 28 of the Five Tribes Act, it did so "over the strenuous objections of" the federal executive. *Harjo v. Kleppe*, 420 F. Supp. 1110,

1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). The executive's campaign of "bureaucratic imperialism," *id.*—designed to frustrate the laws Congress had passed—cannot remove the Creek reservation from federal jurisdiction.

This Court rejected a similar argument in *John*—a post-1948 Major Crimes Act case addressing federal jurisdiction under § 1151(a). Mississippi argued that, because "the Federal Government long ago abandoned its supervisory authority" over "Choctaws residing in Mississippi," there was no "basis for federal jurisdiction." 437 U.S. at 652. This Court disagreed, explaining that "the fact that federal supervision ... has not been continuous" does not "destroy[] the federal power to deal with them." *Id.* at 653. So too here, any gaps in the Executive Branch's supervision cannot destroy the "jurisdiction of the United States Government." 18 U.S.C. § 1151(a). Only Congress can.[6]

Even if something short of disestablishment could remove a reservation from the "jurisdiction of the United States Government," Congress—before statehood and after—continued federal jurisdiction over the Creek reservation. In the Five Tribes Act, Congress acted to preserve the Creek, Resp. Br. 11, precisely so the federal government would not "let go of our

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[6] After *Carcieri*, the Interior Department reached a similar conclusion regarding the IRA's "under federal jurisdiction" requirement: "[E]vidence of executive officials disavowing legal responsibility ... cannot, in itself, revoke jurisdiction absent express congressional action." U.S. Dep't of Interior Solicitor's Opinion M-37029, at 20 (Mar. 12, 2014).

authority" and "control over the property of those Indians." 40 Cong. Rec. 2977 (Sen. McCumber). Then in Section 1 of the Enabling Act, Congress specified that statehood would not "limit or affect the authority of the Government of the United States" over Indians. Congress subjected allotted reservation lands to restrictions on alienation that could be lifted only by the federal government, leaving 85% of lands in Eastern Oklahoma inalienable at statehood and still *half* after 1908, Resp. Br. 3, 13, 36 & n.5—while recognizing that the federal government remained "under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of" Western Oklahoma. *Webb*, 225 U.S. at 686. And in 1909, Congress sought the Creek legislature's approval of its equalization of allotments on the Creek reservation. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805. These badges mark the continuing federal jurisdiction that Congress never lifted from the reservation.

Indeed, for all its hostility, even the federal executive continued to treat the Creek reservation as under federal jurisdiction in statehood's aftermath. Prosecutors indicted liquor offenses premised on the Creek reservation remaining "Indian country." *See, e.g.*, *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 548 (1915). Meanwhile, the BIA kept its Indian agents on the ground running tribal schools on the reservation; BIA police maintained law and order; and Interior Department maps showed the Creek reservation. Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 91; *United States v. Birdsall*, 233 U.S. 233 (1914); J.A. 89-117. Whatever the scope of BIA supervision over time, the Executive

Branch's actions in the wake of statehood reflect continuation of federal supervision, not its termination.

C. The Court Should Not Resolve This Case Based On § 1151(a).

Merits aside, the Court should not resolve this case by narrowing § 1151(a) to exclude some ill-defined and still-to-be-determined set of federal reservations. To Respondents' knowledge, no court has ever weighed such an interpretation—certainly, the Tenth Circuit did not. This Court is mindful that it is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That caution is always wise, and especially so here, where narrowing § 1151(a) would launch years of reservation-by-reservation litigation, with broad and unpredictable effects far beyond Oklahoma.

"While 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975); *see Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987). Repeatedly, this Court has tied the rules governing state and tribal authority in "Indian country" to § 1151's definition.[7] Likewise, Congress has

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[7] *See, e.g.*, *DeCoteau*, 420 U.S. at 428-30 (state civil adjudicatory and criminal authority over Indians); *Venetie*, 522 U.S. at 525 (tribal tax authority over non-Indians); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (state tax authority over Indian-to-Indian sales); *McClanahan*, 411

incorporated § 1151's definition of "Indian country" throughout the U.S. Code.[8]

With § 1151(a) so pivotal, grave uncertainty would result from a holding that reopened the settled law that all federal reservations are "under the jurisdiction of the United States Government." *Supra* 17-19; *Mattz*, 412 U.S. at 483 n.1, 506. On many reservations, Congress has removed core aspects of federal jurisdiction—including in Public Law 280, which grants certain States criminal and civil jurisdiction that is *exclusive* of federal

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U.S. at 165 (state tax authority over Indian incomes).

[8] 6 U.S.C. § 601 (homeland security grants); 10 U.S.C. § 284 (counterdrug activities); 15 U.S.C. § 375 (cigarette taxes); 15 U.S.C. § 632 (ranching and agricultural small businesses); 15 U.S.C. § 1175 (gambling devices); 15 U.S.C. § 1243 (switch knives); 15 U.S.C. § 1245 (ballistic knives); 16 U.S.C. § 3371 (transportation of fish, wildlife, or plants); 18 U.S.C. § 1164 (destruction of reservation boundary signs); 18 U.S.C. § 1460 (obscene matter); 18 U.S.C. § 2252 (sexual exploitation of minors); 18 U.S.C. § 2266 (tribal protection orders); 18 U.S.C. § 2346 (civil suits regarding tobacco sales); 25 U.S.C. § 1304 (VAWA jurisdiction); 25 U.S.C. § 1616e-1 (grants for Indian Health Service clinics); 25 U.S.C. § 1903 (Indian Child Welfare Act); 25 U.S.C. §§ 2801-2802 (assistance for tribal law enforcement); 25 U.S.C. §§ 2801, 2804 (aid in enforcing tribal criminal law); 25 U.S.C. § 3202 (child-abuse reporting); 25 U.S.C. § 4303 (assistance for Native American businesses); 28 U.S.C. § 1442 (federal-officer removal); 28 U.S.C. § 1738B (child support orders); 33 U.S.C. § 1377 (sewage treatment projects); 33 U.S.C. § 2269 (water resources development projects); 34 U.S.C. §§ 12291, 12511 (sexual-assault services); 42 U.S.C. § 608 (TANF assistance); 42 U.S.C. § 6945 (coal combustion residuals units); 42 U.S.C. §§ 10101, 10137-10138 (radioactive-waste repositories); 49 U.S.C. § 40128 (flights over national parks). Many state and tribal laws also incorporate § 1151.

authority. 18 U.S.C. § 1162(c). Are such reservations still "under the jurisdiction of the United States Government"? If not, does that jurisdiction reappear if the State "retrocedes" (*i.e.*, gives back) its jurisdiction, 25 U.S.C. § 1323, or if the federal government reassumes jurisdiction, 18 U.S.C. § 1162(d)? Does it matter *how much* criminal jurisdiction the federal government receives back? *Cf. Morris v. Tanner*, 288 F. Supp. 2d 1133, 1138 (D. Mont. 2003) (retrocession of misdemeanor offenses). What about other transfers of jurisdiction, as in Maine—broader than Public Law 280's in some respects, narrower in others? Act of Oct. 10, 1980, §§ 3, 6, 94 Stat. 1785. Alternatively, what about the many reservations mistakenly thought disestablished, where federal authority was long unexercised? *E.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1081-82 (2016). These questions and more would spur a stampede of litigation nationwide. That is reason enough to leave § 1151(a) alone.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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CAPITAL CASE

SUPPLEMENTAL QUESTIONS PRESENTED

1. Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

2. Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. 1151(a).

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

The United States respectfully submits this brief in response to the Court's supplemental briefing order of December 4, 2018.

SUMMARY OF ARGUMENT

As the government contends in its merits-stage amicus brief (at 28-33), even if the former territory of the Creek Nation might still be recognized in some sense, Oklahoma would have criminal jurisdiction over crimes involving Indians occurring on unrestricted fee lands within that territory. From 1890 through Oklahoma statehood in 1907, Congress passed a series of statutes providing that Indians in the former Indian Territory were subject to the same criminal laws and prosecuted in the same courts as non-Indians. Congress never repealed those statutes, which continue to give Oklahoma jurisdiction over respondent's crime, regardless of the

reservation status of the former territory of the Creek Nation.

The government is aware of no circumstances in which an Indian reservation—set aside, maintained, and denominated as such for a federally recognized tribe—has not been recognized as Indian country under 18 U. S. C. 1151(a). The statutory definition of "Indian country" is broad, and this Court has interpreted it to include formal and informal reservations, dependent Indian communities, trust lands, and restricted allotments. Nonetheless, the Indian Major Crimes Act, 18 U.S.C. 1153(a) (Supp. V 2017), which since 1948 has employed the phrase "Indian country" as defined in Section 1151, does not provide the United States with exclusive jurisdiction over major crimes by Indians within the Creek Nation's former territory, irrespective of whether that territory is in some sense a reservation.

ARGUMENT

I. CONGRESS GRANTED THE STATE OF OKLAHOMA JURISDICTION OVER RESPONDENT'S CRIME, IRRESPECTIVE OF THE RESERVATION STATUS OF LAND WITHIN THE 1866 TERRITORIAL BOUNDARIES OF THE CREEK NATION

The circumstances of the Five Tribes in the former Indian Territory in eastern Oklahoma were unique and bear no resemblance to those of the Tribes in this Court's decisions in the *Solem* v. *Bartlett*, 465 U.S. 463 (1984), line of cases. Those cases concerned whether, in disposing of surplus lands and opening up a reservation within an existing State to non-Indian settlement, Congress had disestablished or diminished the reservation in question. By contrast, *prior* to Oklahoma statehood, the lands of the Five Tribes in the former Indian Territory had *already* been widely settled by

non-Indians—to such an extent that by Oklahoma statehood, there were approximately 70,000 members of those Tribes out of a total population of 700,000. See Gov't Amicus Br. 9. Non-Indians in the Indian Territory resided, worked, and did business on the Five Tribes' lands and were intermingled with tribal members.

Accordingly, *prior* to statehood—and indeed as critical components of breaking up the territories of the Five Tribes and replacing those tribal domains and the Indian Territory with the new State—Congress passed a series of statutes that transformed the governance of that vast region. Thus, Congress abolished tribal courts, barred enforcement of tribal law in the United States Court for the Indian Territory, and ensured that all individuals in the Indian Territory, "irrespective of race," Act of June 7, 1897 (1897 Act), 30 Stat. 83, were subject to the same laws and to the jurisdiction of the same court, including in criminal matters. Then, following statehood, Congress transferred prosecution of *all* crimes of a local nature—including those committed by Indians—to the state courts. Congress specifically designated those state courts as "successors" to the United States Court for the Indian Territory, Oklahoma Enabling Act of June 16, 1906, §§ 17-20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907 (1907 Act), §§ 2, 3, 34 Stat. 1286-1287, and ensured that a uniform body of Oklahoma law would apply in the former Indian Territory, Enabling Act § 21, 34 Stat. 277-278. Those statutes were never repealed. Nothing suggests that Congress, at statehood or thereafter, *sub silentio* revived throughout the former Indian Territory the very distinctions between Indians and non-Indians that it

had expressly eliminated in preparing the Territory and all its residents alike for statehood.

This statutory framework compels the conclusion that crimes committed by or against Indians on unrestricted fee lands in eastern Oklahoma are subject to state jurisdiction, even if this Court were now to conclude, 111 years after statehood, that all of the eastern part of the State consists of Indian reservations. But this statutory framework also confirms that in both law and fact there are no such reservations encompassing the Five Tribes' former territories; by virtue of these statutes, the vast areas of unrestricted fee lands in eastern Oklahoma lack the hallmarks of reservation status, because federal and tribal law do not apply to those lands.

A. By Statehood, Congress Eliminated Criminal-Law Distinctions Between Indians And Non-Indians In The Indian Territory

Congress initially intended to leave the Five Tribes undisturbed in the Indian Territory, subject to their own laws and jurisdiction. See Gov't Amicus Br. 8. As non-Indians flooded the area, however, Congress grew increasingly concerned with what it viewed as the inadequacy of tribal courts and law enforcement. Congress accordingly granted some jurisdiction to a new United States Court for the Indian Territory while retaining some jurisdiction over Indians in tribal courts, but soon determined that the dual systems of justice—one for Indians, and one for non-Indians—were unsustainable.

Thus, between 1897 and 1904, Congress enacted laws to create one system of justice to bring order to the Indian Territory. Congress applied federal and assimilated Arkansas law to Indians and non-Indians alike. It

granted the Court for the Indian Territory exclusive jurisdiction over criminal (as well as civil) cases involving both Indians and non-Indians. And it abolished tribal courts and prohibited the application of tribal law in the Court for the Indian Territory. By the eve of statehood, Congress had eliminated, for all relevant purposes, criminal-law distinctions between Indians and non-Indians.

1. Unlike in other territories, Congress never established a territorial government in the Indian Territory. Instead, the area was initially governed primarily by tribal law, but then was increasingly governed directly by Congress through the laws it "enacted or put in force." *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918); see *Marlin* v. *Lewallen*, 276 U.S. 58, 60-61 (1928); S. Rep. No. 377, 53d Cong., 2d Sess. 6-8 (1894) (1894 Senate Report) (report of Select Committee on the Five Tribes). For most of the late 19th century, tribal courts enforced tribal law, while federal courts in Arkansas, Kansas, and Texas exercised limited federal jurisdiction over non-Indians. See 1894 Senate Report 7-8; H.R. Rep. No. 1191, 58th Cong., 2d Sess. 1 (1904) (Indian Territory was "practically a court-governed Territory without a legislature and without an executive.").

Over time, Congress determined that the distant federal courts were inadequate to meet the needs of the growing non-Indian population of the Indian Territory. See 1894 Senate Report 7-8. Congress took the view that "[t]he whole Indian Territory * * * ha[d], owing to the failure of Congress to provide courts adequate to the wants of the people, become the refuge of criminals and desperadoes from all parts of the country." H.R. Rep. No. 66, 51st Cong., 1st Sess. 6 (1890) (1890 House Report).

As a result, in 1889, Congress created the United States Court for the Indian Territory. Act of Mar. 1, 1889, 25 Stat. 783. The court's criminal jurisdiction was limited to offenses "not punishable by death or by imprisonment at hard labor," § 5, 25 Stat. 783, and excluded crimes between Indians, § 27, 25 Stat. 788.

The next year, Congress extended the court's jurisdiction, Act of May 2, 1890 (1890 Act), § 33, 26 Stat. 96-97, and provided that the laws of the United States prohibiting crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States," § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were assimilated and extended to the Indian Territory for offenses not otherwise governed by federal law. § 33, 26 Stat. 96-97. The Court for the Indian Territory was granted jurisdiction over "all controversies arising between members or citizens" of different Indian nations, including in criminal cases, and the defendant was "subject to the same punishment in the Indian Territory as he would be if both parties were citizens of the United States." § 36, 26 Stat. 97. But the 1890 Act preserved for the Tribes "exclusive jurisdiction of all cases wholly between members of the tribe, and * * * the adopted Arkansas statutes [did] not apply to such cases." *Marlin*, 278 U.S. at 61; see §§ 30-31, 26 Stat. 94-95.

2. A conviction soon emerged in Congress, however, that it was unsustainable for Indians and non-Indians to live side-by-side in the Indian Territory—the latter greatly outnumbering the former, see 1890 House Report 7-8—while being subject to two different legal regimes. Indeed, the 1890 House Report stated that "[t]he Indian should be protected by the same law that

protects the white man." *Id.* at 10. The 1894 Senate Report expressed concern that tribal courts could not address disputes between Indians and non-Indians, and noted "just cause of complaint among the Indians as to the character of their own courts." 1894 Senate Report 7; see *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 449 (1899) (quoting this language).

Congress responded in 1897 by vesting the Court for the Indian Territory with "exclusive jurisdiction" to try all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory, as well as "all civil causes in law and equity" arising there. 1897 Act, 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The 1897 Act reflected the judgment that it was "absolutely impossible" for the separate court systems to "continue to exist." 29 Cong. Rec. 2305 (1897) (Sen. Vest); see, *e.g.*, *id.* at 2323-2324 (Sen. Berry) ("[S]ome change is absolutely necessary. * * * [The tribal courts] are incapable of rendering justice between their own citizens and are bringing scandal upon each of those nations."). Whether Members of Congress supported or opposed this measure, they understood that it "place[d] Indians upon precisely the same plane as the white men." *Id.* at 2324 (Sen. Berry). Indian defendants would "be tried the same as the white men who are now in the Territory." *Ibid.*; see *id.* at 2341 (Sen. Vilas) (the Court for the Indian Territory would "decide all causes of every description" under United States and Arkansas law); *id.* at 2310 (Sen. Bate) (1897 Act eliminated Tribes' "exclusive jurisdiction, where Indians alone are concerned, in both criminal and civil suits"). The Court for

the Indian Territory thus administered law of a local nature for Indians and non-Indians alike, with the local law largely supplied by assimilating the state law of Arkansas.

3. The following year, Congress enacted the Curtis Act, §§ 26, 28, 30 Stat. 495, 504-505, which prohibited the enforcement of tribal law "by the courts of the United States in the Indian Territory," and "abolished" "all tribal courts" in the Territory. The Curtis Act provided that "all civil and criminal causes then pending in any [tribal] court shall be transferred to the United States court in [the Indian] Territory." § 28, 30 Stat. 505.

The Curtis Act provided in another respect for equal application of local laws to Indians and non-Indians alike. It provided for cities and towns within the Indian Territory with a population of at least 200 to be incorporated pursuant to Arkansas law; extended the right to vote in the governance of the cities and towns to all male inhabitants of those areas, whether "citizens of the United States or of * * * [the] tribes"; and provided that "all inhabitants of such cities and towns, *without regard to race*, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein." § 14, 30 Stat. 499-500 (emphasis added); see Act of Mar. 1, 1901, §§ 10-22, 31 Stat. 864-867 (town site provisions of Original Creek Agreement). By 1907, more than 300 towns, totaling nearly 250,000 inhabitants, existed in the Indian Territory. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 187 (1999).

4. In 1901, Congress granted United States citizenship to every Indian in the Indian Territory. Act of

Mar. 3, 1901, 31 Stat 1447. The House Report explained the reasons for doing so: "The independent self-government of the Five Tribes has practically ceased," and "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population is being rapidly carried out." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900). Through citizenship, the Report explained, the Indians would be able to "properly protect their rights" and would "be put upon a level and equal footing with the great population with whom they are now intermingled." *Ibid.*

5. In 1904, Congress reconfirmed the equal treatment of Indians and non-Indians under a uniform body of law. In legislation providing for additional United States judges in the Indian Territory, Congress once again provided that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise.*" Act of Apr. 28, 1904 (1904 Act), § 2, 33 Stat. 573 (emphasis added). Congress further granted the Court for the Indian Territory "full and complete jurisdiction * * * in the settlements of all estates of decedents, [and] the guardianships of minors and incompetents, whether Indian, freedmen, or otherwise." *Ibid.*; see *Hayes* v. *Barringer*, 104 S.W. 937, 938 (Indian Terr. 1907) (holding that the 1904 Act "took from the Indian tribes all jurisdiction"), aff'd, 168 F. 221 (8th Cir. 1909); *In re Poff's Guardianship*, 103 S.W. 765, 766 (Indian Terr. 1907) (similar with respect to probate and guardianship matters).

Thus, on the eve of statehood, *all* individuals in the Indian Territory—"whether Indian, freedmen, or otherwise," 1904 Act § 2, 33 Stat. 573—were subject to the

same substantive laws, both civil and criminal, and to the same jurisdiction of the Court for the Indian Territory, including in criminal cases.[1]

B. Upon The Creation Of The State Of Oklahoma, Congress Ensured That Indians In Eastern Oklahoma Would Continue To Be Subject To The Same Criminal Jurisdiction And Laws As Non-Indians

In 1906, Congress enacted the Oklahoma Enabling Act, which authorized the creation of a new State out of the Oklahoma and Indian Territories. In doing so, Congress did not reinstate the very distinctions between Indians and non-Indians it had eliminated in the Indian Territory in preparation for statehood. To the contrary, the Enabling Act ensured that Indians and non-Indians in the former Indian Territory would continue to be subject to the same criminal (and civil) laws and jurisdiction.

1. The Enabling Act extended the laws of the Oklahoma Territory over the Indian Territory, and all of its inhabitants, in place of the laws of Arkansas to govern matters of a local nature, until the legislature of the new State of Oklahoma provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935). The statute did not apply distinct criminal laws to Indians and non-Indians, resurrect the tribal courts, or permit application of tribal law throughout the former Indian Territory.

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[1] In 1906, in response to *In re Heff*, 197 U.S. 488 (1905), Congress amended Section 6 of the Indian General Allotment Act, 24 Stat. 390, to provide, *inter alia*, that an Indian allottee would be subject to the "exclusive jurisdiction of the United States" until the issuance of a fee patent. Act of May 8, 1906, 34 Stat. 183 (25 U.S.C. 349). Congress further provided, however, that the Act "shall not extend to any Indians in the former Indian Territory."

The Enabling Act's provisions confirmed that Indians and non-Indians were to be treated alike following statehood. "[A]ll causes * * * arising under the Constitution, laws, or treaties of the United States" that were pending in the Court for the Indian Territory were to be transferred to the newly created United States District Court for the Eastern District of Oklahoma. § 16, 34 Stat. 276. "[A]ll" other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts, the "successors" to the United States Court for the Indian Territory. §§ 17, 20, 34 Stat. 276-277. That category included criminal cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons—and to which the laws of the Territory (and then of the State) of Oklahoma were thereafter applied by the Enabling Act.

The next year, Congress amended the Enabling Act to fix a drafting error. Congress had provided for all cases "in which the United States may be a party" to be transferred to the new federal district courts. Enabling Act § 16, 34 Stat. 276. But because "[a]ll criminal cases pending in the courts in the Indian Territory we[re] brought in the name of the 'United States,' * * * this provision would [have] * * * transfer[red] all criminal cases to the United States district and circuit courts of the eastern district of the State of Oklahoma." S. Rep. No. 7273, 59th Cong., 2d Sess. 1 (1907). Congress therefore amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not transferred to the new federal district courts in the State—*i.e.*, cases of a local nature—would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat.

1287; see generally *Stewart*, 295 U.S. at 409-410 (noting that the Oklahoma Constitution designated the new state courts as successors to the Court for the Indian Territory). The 1907 Act thus ensured the transfer to state courts of all cases of a local nature, whether "civil or criminal." § 2, 34 Stat. 1287.

2. a. As the United States has explained (Gov't Amicus Br. 29-30), following statehood, these Acts were consistently interpreted to grant comprehensive criminal jurisdiction to the State in the former Indian Territory—including jurisdiction over crimes by Indians that would have fallen within federal jurisdiction or the exclusive jurisdiction of the Tribes if the usual rules governing Indian country had applied. From the outset, the officials charged with implementing the Enabling Act and enforcing criminal law carried out that congressional plan.

Thus, the sole judge of the new United States District Court of the Eastern District of Oklahoma ordered that "all prisoners" then awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908). The Supreme Court of Oklahoma held that state courts had assumed jurisdiction over all crimes "not of a federal character" in the former Indian Territory, which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Id.* at 944. The Supreme Court of Oklahoma made no exception for crimes of a local nature

involving Indians, and the Oklahoma state courts regularly exercised criminal jurisdiction over crimes between Indians—including prosecutions for murder[2]—in the former Indian Territory. See Gov't Amicus Br. 30; Pet. Br. 39-42. Conversely, from the time of statehood to the present day, the United States has not exercised criminal jurisdiction over crimes by or against Indians within the Creek Nation's 1866 borders—except, since the early 1990s, over the small fraction of that land that still consists of restricted allotments or parcels of tribal trust land. See Gov't Amicus Br. 21-22, 32-33.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), reflects this shared understanding that the State had general criminal jurisdiction over Indians in the former Indian Territory. See Gov't Amicus Br. 30. The Court there held that a pre-statehood statute, which permitted a Choctaw or Chickasaw Indian charged with murder committed in the Indian Territory to be tried in federal district court in Texas, continued to apply following statehood. The Court therefore rejected the defendant's contention that the case should be transferred to state court. 219 U.S. at 90-91. But the Court did not question the premise of the defendant's argument that, as a general matter, criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court. See Pet.

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[2] For example, in *Jones* v. *State*, 107 P. 738 (Okla. Crim. App. 1910), a Choctaw tribal member was indicted prior to statehood for murder committed in the Indian Territory; following statehood, he was tried in state court, *id.* at 738-739, and sought relief in this Court, see Mot. For Leave to File Petition for Writ of Habeas Corpus at 4, *In re Jones*, 231 U.S. 743 (1913) (petitioner informed the Court that he was "a full blood Choctaw Indian").

Br. at 11, *Hendrix*, *supra* (No. 10-319). Nor did the United States, which instead explained that the Enabling Act's provision for transfer of such cases to state court did not apply because the case was not pending in the Court for the Indian Territory at statehood, having already been transferred to the federal court in Texas. Gov't Br. at 17, *Hendrix*, *supra* (No. 10-319).

It is particularly clear that the state courts had jurisdiction over crimes committed by Indians against other Indians following statehood, because if they did not, then *no* court would have had jurisdiction over most such crimes throughout eastern Oklahoma. That is because if, contrary to our principal submission, the entirety of the former Indian Territory consisted of Indian reservations—and if, contrary to the statutes discussed above, Congress intended to subject the entire area to the default jurisdictional rules governing Indian country—federal jurisdiction over crimes between Indians would have been limited to the crimes listed in the Major Crimes Act, § 9, 23 Stat. 385. Under that Act, jurisdiction over non-major crimes between Indians was left to the tribe concerned. But the tribal courts of the Five Tribes had been abolished in 1898. Given Congress's concern with law and order in the area, it is inconceivable that Congress would have left such a large jurisdictional gap in the new State, without so much as a mention in the legislative record.[3]

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[3] Respondent has suggested (Br. 48-49) that any jurisdictional gap could have been filled by the Interior Department, which in 1883 began to establish by regulation "Courts of Indian Offenses." But respondent acknowledges (Br. 49) that "the [governing] regulations excluded" the Five Tribes. See H.R. Exec. Doc. No. 1, Pt. 5, Vol. II, 49th Cong., 1st Sess. 21 (1885). And while respondent states (Br. 49) that "a pen stroke" could have altered that exception, the fact

b. Further underscoring the unique legal regime in eastern Oklahoma, courts contemporaneously understood that civil cases involving Indians were also to be treated in the same manner as those involving non-Indians. In cases arising before statehood (but in some instances litigated thereafter), courts applied Arkansas law to certain civil disputes involving Indians. See, *e.g.*, *Sizemore* v. *Brady*, 235 U.S. 441 (1914) (affirming Oklahoma Supreme Court decision that Arkansas, rather than Creek, law governed inheritance); *George* v. *Robb*, 64 S.W. 615 (Indian Terr. 1901) (holding Arkansas law applied to inheritance dispute between Creek citizens). And in cases arising after statehood, the state courts applied state law to controversies involving Indians. See, *e.g.*, *Barnett* v. *Gross*, 216 P. 153 (Okla. 1923) (contract dispute involving Creek defendant); *Palmer* v. *Cully*, 153 P. 154 (Okla. 1915) (per curiam) (Oklahoma law governed marriage between two Seminole members after 1904); see *Stevens* v. *United States*, 146 F.2d 120, 122 (10th Cir. 1944) (finding it "clear that the marriage relations of Creek Indians in Oklahoma are subject to the laws of the state.").

3. In 1942, Oscar L. Chapman, the Assistant Secretary of the Interior, confirmed in a letter to the Attorney General that the State had jurisdiction over crimes in eastern Oklahoma involving Indians, based on a thorough examination by the Interior Department of the statutes discussed above. Gov't Amicus Br. App. 1a-6a. The Assistant Secretary concluded that the 1897 Act and subsequent statutes relating to the Indian Territory "completely altered the situation in that Territory

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that the Interior Department did not do so following statehood confirms that it (like Congress, federal and state courts, and the State of Oklahoma) did not perceive a jurisdictional gap.

with respect to jurisdiction over Indian crimes," by applying the laws of Arkansas in force in the Territory to all persons "regardless of race" and "abolish[ing] the Indian courts and tribal jurisdiction and organization." *Id.* at 3a. Those Acts, the Assistant Secretary explained, "removed the essential characteristic of Indian country." *Ibid.* Under the Enabling Act, he further concluded, "the State courts succeeded to the jurisdiction of the Territorial courts," *id.* at 4a, and "[j]urisdiction of all crimes by and against Indians is in the State courts," *id.* at 5a.

4. Congress's codification in 1948 of the statutory definition of "Indian country," which includes "land within the limits of any Indian reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code. Act of June 25, 1948, 62 Stat. 757 (18 U.S.C. 1151). Nothing suggests that Congress intended to implicitly repeal the existing, more specific jurisdictional framework governing eastern Oklahoma. See, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted). Instead, "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 162 (1972); see H.R. Rep. No. 152, 79th Cong., 1st Sess. A85-A86 (1945) (1945 House Report). "To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable." *Muniz* v. *Hoffman*, 422 U.S. 454, 470 (1975); see, *e.g.*, *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222 (1957);

United States v. *Ryder*, 110 U.S. 729, 740 (1884). That is particularly true here because the Revisers expressly stated their intent to codify early 20th century case law regarding Indian country. 1945 House Report A85-A86. Cf. Gov't Amicus Br. App. 7a-8a (1963 letter from the Secretary of the Interior to the Attorney General concluding that the 1948 codification did not change the Interior Department's views in the 1942 letter regarding jurisdiction over allotments).[4]

5. A contrary conclusion would significantly disrupt law enforcement in the State of Oklahoma. As noted above, in the 111 years since Oklahoma statehood, we are aware of *no* criminal case involving an Indian that the United States has prosecuted on the theory that the State lacks criminal jurisdiction over crimes occurring throughout the former Indian Territory. See Gov't Cert. Amicus Br. 20; Gov't Amicus Br. 32-33. Transferring jurisdiction over such cases from the State to the United States would vastly increase the scope of federal jurisdiction over crimes involving Indians in eastern

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[4] Respondent observes (Br. 47) that much of eastern Oklahoma remained in restricted allotments at statehood; that the State exercised jurisdiction over crimes involving Indians on those lands; and that the Oklahoma Court of Criminal Appeals held in the late 1980s that the State lacked such jurisdiction, see *State* v. *Klindt*, 782 P.2d 401, 403 (1989). As the government has explained (Gov't Amicus Br. 32-33), the United States argued at the time of *Klindt* and subsequent cases that the State had jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. But this Court denied review in several cases raising that issue, and the United States has since then exercised criminal jurisdiction over those allotments. *Ibid.* This case involves jurisdiction over unrestricted fee lands in the former Indian Territory. Questions of jurisdiction over restricted allotments are not before the Court. See Gov't Cert. Amicus Br. 19-20.

Oklahoma, stretching federal resources in the area. See Gov't Cert. Amicus Br. 21-22. And it would threaten decades of state convictions, including in cases in which the statute of limitations has run and the evidence has gone stale. See Pet. Reply Br. 20-21; 11/27/18 Oral Arg. Tr. 29-31, 75-76. By contrast, recognizing that Oklahoma has criminal jurisdiction over offenses on unrestricted fee lands in the former Indian Territory—regardless of that area's reservation status—would avoid such disruption.[5]

II. WHILE THERE ARE NO CIRCUMSTANCES RELEVANT HERE IN WHICH LAND CONSTITUTES A RESERVATION BUT DOES NOT QUALIFY AS "INDIAN COUNTRY" UNDER 18 U.S.C. 1151(a), THE REFERENCE TO "INDIAN COUNTRY" IN 18 U.S.C. 1153(a) SHOULD NOT BE CONSTRUED TO REMOVE STATE JURSIDICTION OVER RESPONDENT'S CRIME

1. This Court has interpreted the general definition of "Indian country" in 18 U.S.C. 1151 broadly to "include[] 'formal and informal reservations, dependent Indian communities, and Indian allotments, whether re-

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[5] To be sure, a holding that the State obtained exclusive criminal jurisdiction over *all* lands in the former Indian Territory could have other destabilizing effects. It would encourage challenges to *federal* convictions, obtained since the early 1990s, for crimes committed by or against Indians on restricted allotments and parcels of tribal trust land within the former Indian Territory, which constitute only a small percentage of that vast area. See Gov't Amicus Br. 32-33; p. 17 n.4, *supra*. It could also raise questions about the application of federal, tribal, and state law more generally to those allotments and trust lands. For that reason, as well as the others given in the government's merits amicus brief, we urge the Court to resolve this case by holding that there is no modern-day Creek reservation encompassing the entirety of the former territory of the Creek Nation.

stricted or held in trust by the United States.'" *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995) (quoting *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993)); see *United States* v. *John*, 437 U.S. 634, 649 (1978). Section 1151(a) defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. 1151(a). As relevant here, we are unaware of circumstances in which an Indian reservation—set aside, maintained, and denominated as such for a federally recognized tribe—has not been recognized as Indian country under the statutory definition. But such a reservation would normally entail the application of some federal law even on fee lands within its boundaries, which would in turn reflect that the lands are "under the jurisdiction of the United States Government" under Section 1151(a). *Ibid.* Here, however, the unrestricted fee lands in eastern Oklahoma, and Indians present on them, are subject to state, not federal, jurisdiction.[6]

2. Nonetheless, a determination that the Creek Nation's former territory is "Indian country" under Section 1151(a) would not mean that the State lacked criminal jurisdiction over respondent's crime. As discussed

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[6] State-recognized reservations are not "under the jurisdiction of the United States Government," and thus do not constitute Indian country under Section 1151(a). *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii], at 191 (Nell Jessup Newton et al. eds., 2012 ed.); see *id.* § 3.02[9], at 168. That is of no moment here, however, because Oklahoma has not recognized a modern-day Creek reservation.

above, see pp. 16-17, *supra*, Congress codified the definition of "Indian country" in 1948 as part of its general revision of the federal criminal code, without any suggestion that it intended to implicitly repeal the more specific jurisdictional framework that had applied in eastern Oklahoma for decades.

Nor does application of the Major Crimes Act, 18 U.S.C. 1153(a) (Supp. V 2017), to "Indian country" suggest that Congress intended the federal government to exercise exclusive jurisdiction over major crimes committed by Indians in eastern Oklahoma. That statute provides for federal jurisdiction over certain offenses —including murder—committed by one "Indian * * * against the person or property of another Indian or other person" in "Indian country." *Ibid.* Although this Court has stated that the Major Crimes Act's grant of federal jurisdiction is generally exclusive of state jurisdiction, see, *e.g.*, *John*, 437 U.S. at 651 & nn.21-22, that reading is not required by the statutory text. While Section 1153(a) provides that covered offenders "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States," 18 U.S.C. 1153(a) (Supp. V 2017), that language is best understood to identify the class of laws to be applied (*i.e.*, those applying "within the premises, grounds, forts, arsenals, navy-yards, and other places * * * over which the federal government has by cession, by agreement, or by reservation exclusive jurisdiction," *Ex parte Gon-shay-ee*, 130 U.S. 343, 352 (1889)), rather than the effect of Section 1153 on state jurisdiction. See 18 U.S.C. 1152 (employing similar language); cf. *Cohen's Handbook of Federal Indian Law* § 6.04[3][d], at 562-563 (Nell Jessup Newton et al. eds., 2012 ed.)

(suggesting that States and federal government may exercise concurrent criminal jurisdiction in optional Public Law 280 States). But see *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993) (suggesting that federal jurisdiction under the Major Crimes Act generally "is 'exclusive' of state jurisdiction").

Indeed, the history of the Indian Territory indicates that even if the Creek Nation's former territory qualified as a present-day reservation, the Major Crimes Act would not mandate exclusive federal criminal jurisdiction. The Major Crimes Act was first enacted in 1885. § 9, 23 Stat. 385. At that time, as relevant here, it stated that "all Indians, committing against the person or property of another Indian or other person" one of the enumerated crimes within "any Territory of the United States" would be tried "in the same courts and in the same manner and shall be subject to the same penalties" as all other persons. *Ibid.* Yet, to the extent that rule applied in the Indian Territory, it was "superseded" by the 1897 and 1904 Acts, Gov't Amicus Br. App. 2a-3a, which brought all crimes committed by Indians in the Indian Territory under the same laws (federal and assimilated Arkansas law) and into the same court (the United States Court for the Indian Territory) as crimes committed by non-Indians.

Nor was the Major Crimes Act revived to govern throughout the former Indian Territory upon statehood. As discussed above, the Enabling Act and 1907 Act ensured that crimes of a local nature committed by Indians following statehood would be prosecuted in state—rather than federal—court, and the enactment of Section 1151(a) in 1948 did not divest the State of that jurisdiction.

CONCLUSION

For the foregoing reasons, as well as those provided in the government's brief as amicus curiae supporting petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* MUSCOGEE (CREEK) NATION IN SUPPORT OF RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether any statute grants the State of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

(2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).

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Treaty with the Creeks, Act of Mar. 24, 1832, 7 Stat. 366 21

Treaty with the Creeks, Act of Feb. 14, 1833, 7 Stat. 417 21

Treaty with the Creek Indians, Act of June 14, 1866, 14 Stat. 785 21

OTHER AUTHORITIES

Carole Goldberg, *Tribal Jurisdictional Status Analysis*, Tribal Law and Policy Institute (Feb. 16, 2010) 20

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The Muscogee (Creek) Nation appreciates the opportunity to address the supplemental questions raised by the Court.

ARGUMENT

I. Although Oklahoma Does Not Presently Enjoy Criminal Jurisdiction Over Tribal Citizens on the Nation's Reservation, Congress Has Provided a Mechanism for the Conferral of Such Jurisdiction Going Forward.

The Nation has a paramount interest in maintaining law and order within its Reservation and is committed to working with the State and the United States to ensure that the administration of criminal justice therein will be enhanced, not hindered, should this Court affirm the decision below. To that end, the Nation will continue to explore with its governmental partners, pursuant to congressionally sanctioned mechanisms, the optimal allocation of criminal jurisdiction among the three sovereigns.

The Nation has scoured the statutory record – including the provisions identified by the United States – to determine whether a basis presently exists for State jurisdiction over crimes committed by or against Indians within the Reservation. For the reasons explained below, the Nation has found no such provision.

A. Where Congress Has Authorized State Jurisdiction Within Indian Country, It Has Done So Explicitly.

"[C]riminal offenses by or against Indians [in

Indian country] have been subject only to federal or tribal laws, except where Congress ... has expressly provided that State laws shall apply." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (citation and quotations omitted). Congress must speak clearly "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bond v. United States*, 572 U.S. 844, 858-59 (2014) (quotations omitted); *see also Yakima*, 439 U.S. at 484.

Congress has frequently authorized state criminal jurisdiction within Indian country, utilizing language that has left no doubt as to its purpose. For example, the 1940 Kansas Act – "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country," *Negonsott v. Samuels*, 507 U.S. 99, 103 (1992) – provides that:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State[.]

18 U.S.C. § 3243. During the following decade, Congress used virtually identical language to thrice authorize state criminal jurisdiction over reservations. *See* Act of May 31, 1946, 60 Stat. 229 (North Dakota); Act of June 30, 1948, 62 Stat. 1161 (Iowa); 25 U.S.C. § 232 (1948) (New York); *see also* Act of Oct. 5, 1949, 63 Stat. 705 (California).

Congress's policy of granting specific states jurisdiction over Indians within Indian country culminated in 1953 with Public Law 280 ("PL-280"). Act of Aug. 15, 1953, 67 Stat. 588 (codified at 28 U.S.C. § 1360 and 18 U.S.C. § 1162). As relevant here, PL-280 provided that California, Minnesota, Nebraska, Oregon, Wisconsin, and (in 1958) Alaska "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country ... to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory[.]" 18 U.S.C. § 1162(a). Originally, the law also authorized other states to assume criminal jurisdiction over their Indian country without tribal consent. At least six additional states did so in whole or in part. *Felix S. Cohen's Handbook of Federal Indian Law* § 6.04[3][a] & n.47 (Nell Jessup Newton eds. 2012).

During its PL-280 deliberations, Congress identified Oklahoma as one of eight states that would need to amend the "express disclaimer[] of jurisdiction" over Indian lands in its Constitution before assuming criminal authority over its Indian country. S. Rep. No. 83-699, at 7 (1953). Oklahoma declined to do so, and consequently does not exercise jurisdiction pursuant to PL-280. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

B. Congress Has Not Authorized State Jurisdiction Over Tribal Citizens Within the Nation's Reservation.

The United States has identified four statutes as "especially significant to Oklahoma's criminal jurisdiction over crimes involving Indians." US Br. 28. The Nation has found no text in those enactments granting Oklahoma jurisdiction over Indians within Indian country.

1. The Appropriations Act of 1897 granted the United States courts in the Indian Territory "original and exclusive jurisdiction and authority to try and determine all ... criminal causes for the punishment of any offense," and provided that "the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race[.]" Act of June 7, 1897, 30 Stat. 62, 83. This latter provision extended application of the body of law that Congress had established in the Indian Territory under the Act of May 2, 1890, §§ 31-37, 26 Stat. 81, 94-98, but from which it had originally exempted cases involving citizens of the same Indian nation, *id.* § 30.

That body of law was plainly federal in character. At the time, Congress frequently borrowed from state laws to supplement the federal criminal code. For instance, under the 1898 Assimilative Crimes Act, the federal criminal code applicable to federal enclaves included "the laws of the State in which such place is situated[.]" § 2, 30 Stat. 717, 717 (codified as amended at 18 U.S.C. § 13). "The effect of the act ... was to incorporate the criminal laws of the several States ...

into the statute and to make such criminal laws to the extent of such incorporation laws of the United States." *United States v. Press Publ'g Co.*, 219 U.S. 1, 8 (1911); *see also Lewis v. United States*, 523 U.S. 155, 158 (1998).

The same was true for the Act of 1890, which incorporated Arkansas law as federal law to fill gaps in the latter. Thus, it modified the wording of the Arkansas laws "for the purposes of making said laws ... applicable to the said Indian Territory" (which Congress plainly could not have done with respect to state law per se), § 32, 26 Stat. at 96; provided that "all prosecutions therein shall run in the name of the 'United States,'" *id.*; and in language making the gap-filling nature of Arkansas law apparent, declared that "where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern," *id.* § 33, 26 Stat. at 96-97. *See Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 978 (10th Cir. 1987) (1897 Act provided "that the *body of federal law* in Indian Territory ... included the incorporated Arkansas laws" (emphasis added)).

The Nation cannot discern (and the United States has not explained) how applying federal and incorporated Arkansas law to the Indian Territory conferred criminal jurisdiction on the future State of Oklahoma. A 1942 letter from the Assistant Secretary of the Interior suggests that Indian Territory courts enforced both "Territorial" and federal law under the 1890 Act, US Br. 2a, and that the former function was transferred to state courts upon statehood. But the

predicate is incorrect. The 1890 Act established the Oklahoma Territory, including a territorial legislature empowered to enact territorial laws, and vested courts in the Oklahoma Territory with jurisdiction to enforce them. §§ 1, 4, 6, 9, 26 Stat. at 81-87. The Oklahoma Territory therefore was governed by two distinct bodies of law. *See Brown v. United States*, 146 F. 975, 976 (8th Cir. 1906) ("The district courts of the [Oklahoma] territory have a dual jurisdiction, one to administer the local law of the territorial government and the other to administer the laws of the United States[.]"). In the Indian Territory, however, "no organized territorial government was ever established," *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 584 (1916), and hence the Territory was subject only to federal and tribal laws.

2. The 1898 Curtis Act likewise did not authorize state jurisdiction over the Indian Territory. While it abolished tribal courts and rendered tribal law unenforceable in the federal courts, Act of June 28, 1898, §§ 26, 28, 30 Stat. 495, 504-05, nothing in the Act relinquished federal jurisdiction over Indian Territory offenses.

3. The 1904 Appropriations Act reaffirmed application in the Indian Territory of the incorporated Arkansas laws put in place under the 1890 and 1897 Acts. Act of Apr. 28, 1904, § 2, 33 Stat. 573, 573. It contains no text vesting criminal jurisdiction over Indians in the Territory in a future state government.

4. Finally, the Enabling Act preserved federal jurisdiction over Indians within Indian country:

> [N]othing contained in the said [State]

> constitution shall ... limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

Act of June 16, 1906, § 1, 34 Stat. 267, 267-68. Shortly after statehood, this Court affirmed that this language preserved "existing laws and regulations" pertaining to tribal citizens in the Indian Territory. *Ex parte Webb*, 225 U.S. 663, 683 (1912).

The United States points to the Act's case transfer provisions, §§ 16, 20, 34 Stat. at 276-77. US Br. 29. These provisions directed cases pending upon statehood and "arising under the Constitution, laws, or treaties of the United States" to the federal courts, § 16, 34 Stat. at 276, and thus did not shift criminal jurisdiction over federal crimes to the new state courts. That Congress did not intend for these transfer provisions to alter the jurisdictional status quo was reinforced the next year, when Congress amended Section 16 to state that pending criminal cases "which, had they been committed within a State [at the time of commission], would have been cognizable in the Federal courts, shall be transferred to" the new federal courts. Act of Mar. 4, 1907, 34 Stat. 1286, 1287. Crimes involving Indians on reservations within states were cognizable in federal court under the General Crimes Act, as were all major crimes committed by Indians, so again it is difficult to

attribute to this provision any congressional intent to shift jurisdiction. After statehood, Oklahoma, like every state, acquired jurisdiction over Indian country crimes involving only non-Indians. *See United States v. Ramsey*, 271 U.S. 467, 469 (1926). But federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before[.]" *Id.*

The United States also points to Enabling Act provisions extending Oklahoma Territory laws throughout the new state. US Br. 29. The first provision was limited to election laws. § 2, 34 Stat. at 268. The second extended territorial laws throughout the new state "as far as applicable," which only begs the question. § 13, 34 Stat. at 275. The final provided that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States." § 21, 34 Stat. at 277-78. Nothing here indicates that Congress intended to alter the nationwide status quo respecting criminal jurisdiction within Indian country. The Nation has not found legislative text elsewhere accomplishing that end.

C. Congress Has Provided a Mechanism for the United States, the State, and the Nation to Allocate Criminal Jurisdiction Pursuant to a Negotiated Agreement.

Congress has established a clear statutory mechanism as one alternative for allocating criminal jurisdiction going forward. As noted, PL-280 offers states the option of assuming full or partial jurisdiction over Indian country within their borders.

Originally, tribal consent was not required. *See* 67 Stat. 588. Congress has since amended the law to create a more collaborative jurisdictional framework:

> (1) In general. The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, ... jurisdiction over any or all of such offenses committed within such Indian country or any part thereof ... to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.
>
> (2) Concurrent jurisdiction. At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code, within the Indian country of the Indian tribe.

25 U.S.C. § 1321(a). Should the Court affirm the decision below, the Nation is committed to consummating appropriate jurisdictional agreements

with the State and federal governments, and PL-280 supplies a framework for doing so. *See Duro v. Reina*, 495 U.S. 676, 697 (1990).

Congress can also pass legislation specifically altering the jurisdictional balance. For instance, six weeks after a state court determined that Colorado lacked criminal jurisdiction over the Southern Ute Indian Reservation, Congress ratified an agreement defining the Reservation's boundaries and allocating criminal and civil jurisdiction in carefully delineated fashion between the federal, state and tribal governments. Act of May 21, 1984, 98 Stat. 201. *See United States v. Burch*, 169 F.3d 666, 669 (10th Cir. 1999). *See also, e.g.*, Act of Oct. 19, 1994, § 2, 108 Stat. 3501, 3501-02 (establishing concurrent federal, state, and tribal criminal jurisdiction within the Mohegan Nation in Connecticut).

In sum, although no statute presently accords Oklahoma jurisdiction over crimes involving tribal citizens on the Nation's Reservation, both framework and precedent exist for an agreement providing for the same.

D. Affirming the Nation's Reservation Boundaries Will Not Cause Significant Disruption of Settled Convictions.

At oral argument, counsel for the State predicted that affirmance would result in the release of several thousand prisoners in state custody. Tr. 75-76. These concerns are severely exaggerated.

First, counsel's estimate assumes that the status of each of the Five Tribes' reservations will be resolved

here. *Id.* However, diminishment is determined case-by-case, and the Tenth Circuit has already limited its decision to the Creek Reservation. *Comanche Nation of Okla. v. Zinke*, No. 17-6247, 2018 U.S. App. LEXIS 35174, at *10 (10th Cir. Dec. 14, 2018) ("Our *Murphy* panel concluded the Creek Reservation remains extant, but it did not address the status of the Chickasaw Reservation at all.") (per curiam).[1]

Second, state prisoners who successfully challenged their convictions would, like Respondent, face the prospect of retrial by the United States. *See Magnan v. Workman*, No. CIV-09-438-RAW-KEW, 2011 U.S. Dist. LEXIS 160272 (E.D. Okla. Aug. 23, 2011) (upholding subsequent federal conviction after state prosecution invalidated on the basis of Indian country jurisdiction). Because federal sentences are often more severe than state ones, *see* Tribal Law & Order Comm'n, *A Roadmap for Making Native America Safer*, Ch. 5, at 119 (2013) (*available at* https://www.aisc.ucla.edu/iloc/report/), many potential claimants may choose not to challenge their existing convictions. And counsel's argument ignores entirely the Nation's strong interest in public safety, including the important role played by Nation prosecutions and its enhanced sentencing authority under the Tribal Law and Order Act. Creek Br. 28.

Third, for those prisoners who would nevertheless pursue habeas relief, both federal and

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[1] Judge Matheson, the author of the opinion below, also sat on the *Comanche* panel.

state law doctrines bar untimely efforts to overturn settled convictions.

Federal habeas petitions must be filed within one year, 28 U.S.C. § 2244(d), and strict limitations exist on the filing of second or successive petitions, *id.* § 2244(b). The Tenth Circuit has already determined that the decision below provides no basis for overcoming these limitations as it is not of constitutional dimension and does not implicate newly discovered evidence. *Boyd v. Martin*, No. 17-6230, 2018 U.S. App. LEXIS 24391, at * 7-8 (10th Cir. Aug. 28, 2018); Order, *In re Brown*, No. 17-7078 (10th Cir. Dec. 21, 2017). For state claims, Oklahoma applies laches to untimely habeas petitions, *see Paxton v. State*, 903 P.2d 325 (Okla. Crim. App. 1995), including those challenging state court jurisdiction, *see McIntosh v. Hunter*, No. CIV 16-460-RAW-KEW, 2017 U.S. Dist. LEXIS 132950, at *6 (E.D. Okla. Aug. 21, 2017) (citing *McIntosh v. State*, PC-2016-343 (Okla. Crim. App. 2016)).

Accordingly, the suggestion that vindicating the Nation's Reservation boundaries will result in the release of thousands of violent criminals is hyperbole and supplies no basis for decision here.

II. While Limited Circumstances Exist Where Reservations Do Not Meet the Statutory Definition of Indian Country, They Are Not Present Here.

The answer to the Court's second question resides in the plain language of 18 U.S.C. § 1151(a), which provides that "Indian country" includes "all land within the limits of any Indian reservation under

the jurisdiction of the United States Government, notwithstanding the issuance of any patent[.]" This text excludes only reservations not under the jurisdiction of the federal government, and this Court's precedents are clear that when the United States sets aside lands for a tribe under federal control, it retains jurisdiction over the resulting reservation unless Congress affirmatively relinquishes that jurisdiction through disestablishment. Short of such action, the only circumstance where a reservation does not enjoy Indian country status is where it never came under federal jurisdiction in the first instance, as in the case of reservations of land for state-recognized tribes falling under state jurisdiction.[2]

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[2] Approximately 54 tribes enjoy state, but not federal, recognition. *See* http://www.ncai.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#State. Courts have consistently rejected claims that state-recognized reservations, or the Canadian components of cross-border reservations, are Indian country under section 1151(a). *See, e.g., Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 174 (2d Cir. 2005) (portion of Iroquois Confederacy reservation in Canada does not qualify as Indian country under section 1151 regardless of status accorded it by Canada); *City of N.Y. v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 U.S. Dist. LEXIS 20953, at *35-39 (E.D.N.Y. Mar. 16, 2009) (New York-recognized Poospatuck Reservation not Indian country under section 1151); *State v. Piper*, No. CR21-57349, CR21-57446, 1996 Conn. Super. LEXIS 1160, at *15-16 (Conn. Super. Ct. May 3, 1996) (section 1151(a) does not bar state prosecution of member of Connecticut-recognized Paugussett Tribe because the reservation is under state, not federal, jurisdiction).

Neither circumstance applies here. The Creek Reservation was established and brought under federal jurisdiction by the Treaties of 1832 and 1833. Moreover, accepting for present purposes the assumption embedded in the Court's question (that the Creek lands still qualify as a reservation), Congress has not taken the steps necessary to remove the Reservation from federal jurisdiction. As explained below, this would be so even if Congress had conferred criminal jurisdiction on the State.

A. Section 1151(a) Includes All Indian Reservations Set Aside by the United States That Have Not Been Disestablished by Congress.

Section 1151(a) finds its origins in the 1885 Major Crimes Act, which established federal jurisdiction over seven felony offenses committed by Indians "within the limits of any Indian reservation[.]" Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385. Congress amended the Act in 1932 to include additional felony offenses and to refine its application to "any Indian reservation *under the jurisdiction of the United States Government*[.]" Act of June 28, 1932, 47 Stat. 336, 337 (emphasis added). The scant legislative history indicates that the 1932 amendment was introduced at the request of the Secretary of the Interior, but tells us nothing further about the added language, which Congress carried forward in section 1151(a) in 1948. *See* S. Rep. No. 72-746 (1932); S. Rep. No. 72-1446 (1932) (no mention of this phrase).

In *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009), this Court determined that the term "now" in the

phrase "now under Federal jurisdiction," 25 U.S.C. § 479, had a well-known meaning when the Indian Reorganization Act was enacted in 1934 by looking primarily to Webster's New International Dictionary (1934). "Jurisdiction" likewise had a commonly understood meaning when the 1932 amendment was passed:

> 2. Authority of a sovereign power to govern or legislate; power or right to exercise authority; control. 3. Sphere of authority; the limits, or territory, within which any particular power may be exercised.

Webster's New International Dictionary 1347 (2d ed. 1934). This definition endures today, *see* Webster's Third New International Dictionary 1227 (2002), and in *United States v. Rodgers*, 466 U.S. 475 (1984), this Court used it to interpret the phrase "within the jurisdiction of any department or agency of the United States" as it appears in 1934 amendments to the federal criminal code:

> "Jurisdiction" is not defined in the statute.... Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.

Id. at 478-79.

Thus, a reservation "under the jurisdiction of the United States Government" would have been understood, both in 1932 and 1948, as one subject to the authority of the federal government. It was further understood that this authority resided principally in Congress, which then as now was recognized to enjoy "broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Ramsey*, 271 U.S. at 471 ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within ... the United States[.]").

The federal government establishes a "reservation [as] Indian country ... [by] validly set[ting it] apart for the use of the Indians ... under the superintendence of the Government." *United States v. Pelican*, 232 U.S. 442, 449 (1914); *see also Donnelly v. United States*, 228 U.S. 243, 269 (1913). And once a reservation is established, Congress's authority remains in place and coextensive with its boundaries until Congress indicates otherwise. In an 1894 Major Crimes Act case arising on land claimed by the State of Wisconsin, the Court explained:

> But, *independently of any question of title*, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, ... they have full authority to pass such laws

> and authorize such measures as may be necessary to give to these people full protection ... within such reservations.

United States v. Thomas, 151 U.S. 577, 585 (1894) (emphasis added).

Just as "it rests with Congress" to decide whether to relinquish federal jurisdiction over particular groups of Indians, *United States v. Nice*, 241 U.S. 591, 598 (1916), so too is it for Congress to determine whether to relinquish federal jurisdiction over reservation lands. Thus, in *United States v. Celestine*, 215 U.S. 278, 285-86 (1909), this Court addressed whether federal jurisdiction existed pursuant to the Major Crimes Act over a crime committed on patented lands in the federally established Tulalip Reservation. It held that the patents did not operate as "a surrender of jurisdiction," *id.* at 290, because "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress," *id.* at 285.

These decisions are the pillars on which section 1151(a) stands. *See* 18 U.S.C. § 1151, Reviser's Notes (citing *Donnelly* and *Pelican*); *United States v. John*, 437 U.S. 634, 649 (1978) (citing *Celestine* in holding that the Mississippi Choctaw possess a "reservation" under section 1151(a)). And subsequent to its passage, this Court authoritatively distilled the scope of section 1151(a) in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962). There, Washington argued that non-Indian fee land within a townsite had passed out of federal jurisdiction when the townsite was platted. *Id.* at 357-59. This Court

disagreed, citing the absence of any language in section 1151 "which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation." *Id.* at 359. *See also Kills Plenty v. United States*, 133 F.2d 292, 293 (8th Cir. 1943) (cited in Reviser's Notes) (rejecting argument that "'within the limits of any Indian reservation'" refers only to land "'the Indian title to which has not been extinguished,'" and thus upholding federal jurisdiction over crime committed on non-Indian townsite).

The rule, then, is straightforward. Once the federal government has established an Indian reservation, only Congress – as the principal repository of federal power over Indian affairs – may surrender federal jurisdiction over it. Congress's intent to do so is not supplied by statehood, *Pelican*, 232 U.S. at 445; *Donnelly*, 228 U.S. at 271; citizenship, *Celestine*, 215 U.S. at 289-90; allotment, *Mattz v. Arnett*, 412 U.S. 481, 504 (1973); or fee patents "issued to non-Indians and Indians alike," *Seymour*, 368 U.S. at 358.[3]

This Court has unanimously held that a state's assumption of jurisdiction, even with the acquiescence

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[3] Congress's express exclusion, for the limited purposes of 18 U.S.C. §§ 1154 and 1156, of "fee-patented lands in non-Indian communities" from "Indian country" underscores that section 1151(a) includes such lands.

of executive branch officials, likewise does not substitute for the congressional action needed to place a reservation beyond the reach of section 1151(a):

> We assume ... as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But ... we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

John, 437 U.S. at 652-53; *cf. Carcieri*, 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time.").

Perhaps most importantly for present purposes, Congress does not remove a reservation from section 1151(a)'s scope by conferring criminal jurisdiction or other specific authority on a state. Indian country status marks the bounds of both criminal and civil jurisdiction, and is used by Congress and the courts to determine issues ranging from state taxing authority, *Okla. Tax Comm'n*, 508 U.S. at 123, 128, to tribal authority under the Violence Against Women Act, 25 U.S.C. § 1304(a)(3); 18 U.S.C. § 2265(e). Thus, even

where Congress has conferred state criminal jurisdiction over on-reservation Indian crimes, *see supra* at 2-3, the reservations remain Indian country. *See* PL-280, 18 U.S.C. § 1162(a) (providing for state criminal jurisdiction over crimes involving Indians "*in the areas of Indian country* listed" (emphasis added)). Any contrary holding would have seismic consequences, as it would call into question the Indian country status of at least 195 reservations in the 22 states where Congress has conferred criminal authority, upending the well-settled balance of federal, state, and tribal authority that goes with it.[4]

B. The Creek Reservation Remains Under Federal Jurisdiction.

The Creek Reservation came "under the jurisdiction of the United States Government" upon its establishment and remains Indian country today. The 1830 Removal Act promised federal "superintendence and care" for any removed tribe in the possession of its new lands. Act of May 28, 1830, § 6, 4 Stat. 411, 412. The Creek treaties affirmed this commitment, subjecting Creek self-government to

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[4] The state numbers include mandatory and optional PL-280 states where full retrocession has not occurred, as well as other states with statutory conferrals of criminal jurisdiction. The reservation numbers include affected reservations in those states. The Nation compiled these numbers with reference to the relevant statutes; *Cohen's Handbook of Federal Indian Law* § 6.04[3][a], [g], [4] (2012); and Carole Goldberg, *Tribal Jurisdictional Status Analysis*, Tribal Law and Policy Institute (Feb. 16, 2010) (*available at* http://www.tribal-institute.org/lists/tjsa.htm).

"the general jurisdiction which Congress may think proper to exercise over them." Act of Mar. 24, 1832, art. XIV, 7 Stat. 366, 368; *see also* Act of Feb. 14, 1833, art. I, 7 Stat. 417, 418 (recognizing federal obligation of "care and protection"). The 1866 Treaty confirmed the continuing federal authority to enact "such legislation as Congress and the President ... may deem necessary" for the Creeks and their lands. Act of June 14, 1866, art. X, 14 Stat. 785, 788. It further directed the erection of federal agency buildings on "the reduced Creek reservation, under the direction of the superintendent of Indian affairs." *Id.* art. IX, 14 Stat. at 788.

These treaties evidence quintessential federal control over the Creek Reservation – control that Congress kept in place both before and after statehood. For example, the 1901 Allotment Act subjected Creek legislation to presidential veto. Act of Mar. 1, 1901, § 42, 31 Stat. 861, 872. *See also Morris v. Hitchcock*, 194 U.S. 384, 388 (1904) (upholding authority of Secretary to enforce federal and tribal regulations "within [the] borders" of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (same for Creek Nation). And when Congress preserved the Creek government in the Five Tribes Act, it continued to subject to presidential veto not only Creek legislation, but also all contracts affecting Creek property. Act of Apr. 26, 1906, § 28, 34 Stat. 137, 148.

Indeed, Congress enacted section 28 specifically to maintain federal control "over the property of [the] Indians" and to prevent that property from being

"controlled by the new State." 40 Cong. Rec. 2959, 2977 (1906) (Sen. McCumber); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 306 (1911) (describing Act as "a comprehensive system of protection as to such Indians"). Accordingly, the Enabling Act provided that statehood would have no effect on "the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights ... which it would have been competent to make if this Act had never been passed." § 1, 34 Stat. at 267-68. Congress was thus "careful to preserve the authority of ... the United States over the Indians, their lands and property, which it had prior to the passage of the act." *Tiger*, 221 U.S. at 309; *see also Coyle v. Smith*, 221 U.S. 559, 570 (1911).

Petitioner's narrative of the wholesale surrender of federal jurisdiction over Creek lands was rebuffed immediately in the wake of statehood. *See* Creek Br. 23-25 (describing defeat of Owen amendment); 42 Cong. Rec. 2576, 2586 (1908) (Sen. Curtis) (rejecting Owen argument that the Five Tribes' lands had come under Oklahoma's jurisdiction because "[t]he Government still has control of those lands"). As this Court has explained, Congress recognized that "the Government of the United States was under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of the other territory that went to form the new State." *Webb*, 225 U.S. at 686.

Thus, Congress's commitment in the 1901 Allotment Act "to maintain strict [liquor] laws in said [Creek] nation," § 43, 31 Stat. at 872, continued in full force after statehood, including within the City of

Tulsa, which had been platted as a townsite under the Act. Creek Br. 11. In *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915), this Court upheld a conviction for conspiracy under a statute prohibiting the introduction of liquor into "Indian country." Notably, the federal indictment charged the defendants with conspiring:

> "to commit an offense against the United States of America, to wit, ... to introduce ... liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into *the City of Tulsa* ... which was formerly within and *is now a part of what is known as the Indian country*, and into other parts and portions of that part of Oklahoma which lies within the Indian country."

Id. at 534-35 (emphases added) (quoting indictment). While the Court upheld the conviction on other grounds, the United States clearly viewed Tulsa as Indian country under its jurisdiction and acted on that understanding. *See also, e.g., United States v. Birdsall*, 233 U.S. 223, 233 n.2 (1914) (describing federal liquor statute enforcement efforts by "Indian agents and superintendents and their Indian police" in the Indian Territory, including special agents "sent to Oklahoma ... [to] supplement the efforts of superintendents in charge of reservations" (quotations omitted)); *Ammerman v. United States*, 216 F. 326, 328 (8th Cir. 1914) (indictment charged defendant with importing liquor into "'the county of

Tulsa'" which "'at all times was and is now a part of the Indian Country'").[5]

Congress continued to exercise its jurisdiction in other key areas, including in the maintenance of tribal schools, a hallmark of federal reservation status. *Solem v. Bartlett*, 465 U.S. 463, 474 (1984) (schools maintained "for the benefit" of Indians indicate "area would remain part of the reservation" (quotations omitted)). Petitioner asserts that after statehood Congress left the Creek Nation with "no schools, no buildings," Br. 22, an oft-repeated claim of popular historians. However, in its first appropriations act after statehood, Congress authorized monies "[f]or the maintenance, strengthening, and enlarging of the tribal schools of the [Five Tribes] ... and the establishment of new schools under the control of the Department of the Interior[.]" Act of Apr. 30, 1908, 35 Stat. 70, 91. Such provisions appeared regularly in annual Indian appropriations acts well after Oklahoma established a public school system. *See, e.g.*, Act of Mar. 3, 1921, § 18, 41 Stat. 1225, 1243 (appropriating monies "for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said [Five] tribes"). Congressional superintendence

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[5] Today, liquor transactions are permitted in Indian country so long as they conform with state law and any tribal ordinance approved by the Secretary of the Interior. *See* 18 U.S.C. § 1161; *Rice v. Rehner*, 463 U.S. 713, 733-35 (1983); *United States v. Mazurie*, 419 U.S. 544, 547 (1975).

over a comprehensive array of other reservation affairs – including tribal government, infrastructure improvements, tribal and allotted lands, tribal police, legal and financial affairs, mineral leasing, building rentals, child welfare, and tribal hospitals – likewise continued.[6]

Oklahoma, of course, asserted jurisdiction as well, including criminal jurisdiction over Indians on the Reservation, and often with the acquiescence of executive branch officials. As discussed above, however, the non-sanctioned assumption of jurisdiction by a state, with or without the approval of federal officials, does not erase a reservation's Indian country status under section 1151(a). *See John*, 437 U.S. at 652. Since *United States v. McBratney*, 104 U.S. 621 (1882), this Court has recognized that "control of offenses committed by white people against whites" on Indian reservations passes to states upon their admission. *Donnelly*, 228 U.S. at 271. And, as discussed above, Congress has frequently and expressly conferred on states criminal jurisdiction over reservation Indians. But given that these *lawful* exercises of state authority do not call into question the Indian country status of reservations, the unlawful exercise of state authority does not either. Indian reservations set aside by the federal

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[6] *See, e.g.*, 35 Stat. 781, 803-07 (1909); 36 Stat. 269, 281-82 (1910); 36 Stat. 1058, 1069-70 (1911); 37 Stat. 518, 530-34 (1912); 38 Stat. 77, 95-97 (1913); 38 Stat. 582, 598-602 (1914); 39 Stat. 123, 146-49 (1916); 39 Stat. 969, 983-86 (1917); 40 Stat. 561, 579-84 (1918); 41 Stat. 3, 21-25 (1919); 41 Stat. 408, 426-28 (1920); 41 Stat. 1225, 1242-43 (1921).

government remain "under the jurisdiction of the United States Government" until Congress says otherwise, and Congress has never so spoken with respect to the Creek Reservation.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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December 28, 2018

No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

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SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

This case is before the Court because, in 2004, a lawyer devised a creative strategy to avoid a client's capital-murder conviction—the notion that Tulsa and the surrounding area was once part of an Indian reservation that Congress never disestablished. Flipping an old maxim on its head, it was deemed better to let one guilty man go free, even if it meant upending the lives of millions of innocent Oklahomans. Having achieved that unsettling result, respondent now dismisses as mere "storytelling" the State's reliance on interrelated statutes, historical context, longstanding practices, and the federal government's unwavering views for a century. Respondent has his own story, and it's to demand that this Court look at statutes in isolation, searching for special words to show disestablishment. To respondent, everything else is irrelevant. But if one ignores enough proof, even the Earth can appear flat.

This case is too important and the stakes too high—for the State, the federal government, and the 1.8 million residents of eastern Oklahoma—to be resolved by "gotcha textualism" that casts aside the universal contemporaneous understanding and implementation of decades of legislative action. No court, no tribe, and no member of Congress recognized that eastern Oklahoma was reservation land. This Court should not countenance the largest abrogation of state sovereignty by a federal court in American history by blinding itself to obvious congressional intent. At stake here is the history and identity of our country's forty-sixth state. The Court should decide—now—that Congress created Oklahoma as one unified state.

The State acknowledges the tragedies Congress inflicted on the Five Tribes during removal, allotment, and the destruction of tribal sovereignty. We are not asking the Court to applaud those choices from long ago, only to recognize what actually transpired—and to understand that Congress's actions had lasting consequences for jurisdiction in Oklahoma that went unquestioned for over a century and persist today.

1. In answering "no" to the Court's first question, respondent and the Tribe argue that everyone over the last century misread the relevant statutes and that Congress was oblivious or indifferent to events on the ground. Respondent asserts (at 9) that the Enabling Act "practically shouts" that state law did not apply to Indians in the former Indian Territory after statehood. But that is not what the text says, much less shouts—and no one for a century heard what respondent hears. Pet. Suppl. Br. 1–2, 7–8; Pet. Br. 39–43.

Respondent thus accuses (at 13–14) everyone at the time of being too evil or ignorant to act on what the law required. But relevant decision-makers were neither. Federal courts transferred criminal cases involving Indians to state courts following Congress's direction in the Enabling Act. Pet. Reply 11–12; Cert. Reply 9–10. And this Court and the Solicitor General understood that Congress transferred jurisdiction over Indians in the former Indian Territory to the State. *Hendrix v. United States*, 219 U.S. 79, 90–91 (1911); Pet. Br. 42–43. If courts and prosecutors were misapplying the law throughout this highly populated area, one would expect some record of ob-

jection. But there was none, not from the tribes, not from members of Congress, not from anyone.[1]

Respondent quotes (at 13–14) from a 1963 Interior Department memorandum stating that Oklahoma "asserted civil and criminal jurisdiction in Indian country ... despite the fact that no Federal statutes of relinquishment had been enacted." But that sentiment refers to the State's alleged "doubtful authority" over allotments in *Oklahoma* Territory—*i.e.*, the *western* half of the State. U.S. Br. 8a–9a. For *Indian* Territory—*i.e.*, *eastern* Oklahoma—Interior had long maintained that Congress gave the State jurisdiction over Indians. U.S. Br. 1a–5a. A July 11, 1941 memorandum by the era's foremost Indian-law authority, Felix Cohen, then-Acting Solicitor for the Interior Department, stated:

> [T]hat all offenses by or against Indians [in the former Indian Territory] are subject to state law ... is justified, I believe, in view of the acts of Congress cited ... particularly the acts abolishing tribal courts and placing criminal jurisdiction over the Indians in the Federal courts at the time of the establishment of the Indian Territory, the proviso in the 1906 act excluding application of that act to the Indian Territory, and the subsequent transfer of jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma.

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[1] Respondent states (at 9) that "[n]o one has ever thought [the Enabling Act] transferred to States criminal jurisdiction over Indian crimes on reservations." True, but that is only because no reservations exist in eastern Oklahoma.

App., *infra*, 1a.[2] In other words, our Nation's preeminent Indian-law expert would have found this an easy case.

2. Skipping over the 1897, 1898, and 1904 Acts, respondent (at 7–8) "[s]tart[s] with the Enabling Act." This bears repeating: respondent's textual argument pretends that the Enabling Act arose in a vacuum. When respondent claims (at 8) that "Oklahoma would be like all other States" that distinguish between crimes committed by Indians and non-Indians on reservations, he omits that Congress had already erased legal distinctions based on Indian status throughout the Indian Territory. Pet. Suppl. Br. 1–4; U.S. Suppl. Br. 6–10. In this regard, respondent's cursory treatment of the 1897 and 1904 Acts misses the point. Those statutes applied the same laws (whether federal or Arkansas law) to Indians and non-Indians alike. Thus, when Congress extended Arkansas law to all persons "irrespective of race," Congress erased the Indian-status-based distinctions that respondent asks this Court to resurrect.

As for the 1898 Curtis Act, respondent insists (at 11) that the abolition of tribal courts did not divest federal jurisdiction over the former Indian Territory. No one is arguing that. Instead, ending tribal courts was a critical step in the process of placing Indians and non-Indians under the same legal framework. At bottom, respondent has no credible answer to the inexplicable jurisdictional gap over Indian-on-Indian crimes that would have existed had the State lacked jurisdiction over such crimes. Pet. Br. 43–44. Con-

[2] On December 24, 2018, the United States provided all parties with this and other recently located documents from the relevant time period.

gress deliberately abolished tribal courts and nonetheless perceived no gap to fill, which only makes sense because *state* jurisdiction filled the void. Pet. Reply 13; U.S. Suppl. Br. 14–15 n.3.

In the wake of the 1897, 1898, and 1904 Acts, it is inconceivable that Congress reimposed Indian-status-based distinctions in a 1907 technical amendment. Resp. Suppl. Br. 8. Respondent's interpretation flies in the face of the legislative history, the contemporaneous interpretation, and the application of the Enabling Act as amended. Pet. Suppl. Br. 5. Congress intended what actually happened: federal crimes were heard in federal court, while local crimes were heard in state courts. The same rules applied to everyone.

Sections 13 and 21 of the Enabling Act likewise did not preserve federal jurisdiction over crimes committed by or against Indians in eastern Oklahoma. Section 13 extended Oklahoma territorial law to the Indian Territory only "as far as applicable" for practical reasons: some Oklahoma territorial laws could not apply in Indian Territory because they conflicted with statutes specific to Indian Territory, such as laws pertaining to liquor and the incorporation of town sites. *E.g.*, Wilson's Revised and Annotated Statutes of Oklahoma, vol. 1, ch. XLIX (1903) (regulations for the sale of liquor in Oklahoma Territory; liquor was prohibited in the Indian Territory, Act of Mar. 1, 1895, ch. 145, § 8, 28 Stat. 693, 697); *id.* ch. XIII, §§ 491–99 (procedures for incorporation of town sites; the Curtis Act and allotment agreements governed incorporation and disposition of town sites in Indian Territory). And § 21 simply confirms the general application of federal law in Oklahoma to the same extent as in other States. In short, no law ab-

rogated the nondiscriminatory jurisdictional framework Congress already had imposed.

Respondent also suggests (at 9–10) that Congress preserved exclusive federal jurisdiction over Indians across the whole Indian Territory in sections 1 and 3 of the Enabling Act. But those sections say nothing about the status of the underlying land irrespective of Indian ownership. Section 1 merely confirms Congress's power to legislate for the protection of Indians and their property, insofar as Indians are wards of the federal government. Section 3 has nothing to do with jurisdiction; it guarantees that the State has no "right or title" to lands then owned by tribal members or the tribes.[3] These provisions do not speak to the critical question in this case—

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[3] Public Law 280's legislative history is not to the contrary. Respondents and the Creek Nation cite a letter from the Assistant Secretary of the Interior that does not represent the views of Congress with respect to jurisdiction in eastern Oklahoma. *See* Resp. Suppl. Br. 10 n.3 (citing S. Rep. No. 83-699, at 7 (1953)); Creek Suppl. Br. 3 (same). The letter observes that various state constitutions disclaim jurisdiction over Indian lands pursuant to state enabling acts, which could pose "legal impediments to the transfer of jurisdiction over Indians on their reservations." *Id.* But the Oklahoma Constitution contains no such disclaimer. *Compare* Okla. Const. art. I, § 3 (renouncing right and title to public lands and Indian lands, and stating that "until the title to any such *public land* shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposition, and control of the United States") (emphasis added), *with, e.g.*, Montana Const. art. I ("[A]ll lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States.").

jurisdiction over *non*-Indian-owned land. Pet. Suppl. Br. 19.[4]

3. All agree that affirmance would have seismic civil consequences. Pet. Suppl. Br. 12–17; U.S. Suppl. Br. 5–10; 15, Resp. Suppl. Br. 23–25; Creek Suppl. Br. 19. Any delay in resolving the original question presented would create an intolerable state of uncertainty. Pet. Reply 13–14. The United States, too, urges this Court to resolve the reservation question now and in Oklahoma's favor. U.S. Suppl. Br. 4, 18 n.5.

The criminal-law implications are even starker. Barriers to federal habeas relief are irrelevant if there are no barriers to *state* relief. Tellingly, the federal defender representing respondent identifies no limits on state collateral review in Oklahoma courts; respondent cites only a general observation from a Minnesota case before punting the issue to the Tribe. Resp. Suppl. Br. 14. The Tribe speculates (at 12) that laches might bar some collateral challenges. But laches and waiver are cut from the same cloth, and the Tribe ignores the mountain of precedent in Oklahoma holding that collateral challenges to subject-matter jurisdiction are never waived and can be raised at *any time*—precedent from which respondent himself benefited. Pet. App. 13a–14a & n.5.[5]

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[4] The same is true of the statement of Senator McCumber, on which Respondent and the Creek Nation rely. Resp. Suppl. Br. 2, 22; Creek Suppl. Br. 21–22.

[5] The unpublished federal district court case the Tribe cites, *McIntosh v. Hunter*, No. 16-460, 2017 WL 3598514 (E.D. Okla. Aug. 21, 2017), which in turn cites an unpublished state case, did not present a question of subject-matter jurisdiction. The Oklahoma court dismissed on the merits the *pro se* litigant's

The Tribe contends (at 11) that state prisoners who successfully challenge their convictions could be retried by the United States. The premise is false, or at least grossly incomplete. Federal statutes of limitation will bar retrial for many convicts. 18 U.S.C. § 3282(a) (five-year limitations period for rape and many other noncapital crimes). We are aware of no basis for tolling years that elapse in state custody. And in many cases, stale evidence will raise formidable hurdles. This case demonstrates the point: the United States would have to retry respondent for a horrific crime he committed two decades ago.

The Tribe's accusation (at 11) that the State "ignores ... the Nation's strong interest in public safety" is shocking, as the Tribe advocates a rule that would open the floodgates to countless attacks on convictions for felonies committed *against* Indian victims, like George Jacobs, the Creek victim here. The Tribe cannot adequately prosecute major crimes, because its sentencing authority is limited to three years for any single offense. 25 U.S.C. § 1302(a)(7)(C). The Tribe's assurances of prosecutorial readiness thus ring hollow. The Tribe will not have to resolve collateral challenges, retry thousands of cases, or sort through the 32,000 felonies committed annually in eastern Oklahoma.[6] The two sovereigns that *would* be affected—Oklahoma and the United States—agree that the result would be disastrous.

To downplay the magnitude of disruption, the Tribe contends (at 11) that reservation status for

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theory that the State had "relinquished" jurisdiction by allowing the federal government to prosecute first. *Id.* at *1.

[6] *See* Supreme Court of Oklahoma, Annual Report Fiscal Year 2016, at 12–14, http://www.oscn.net/static/annual-report-2016.pdf.

each of the Five Tribes' former territories requires an individual analysis. But no one has identified any reason why this Court's decision would not apply to the other Five Tribes, or how their statutory histories differ in any material respect.

It is not clear how Congress could preserve thousands of convictions by retroactively conferring subject-matter jurisdiction on the State. Prospectively, any legislative solution is uncertain at best. The Creeks' supposed "commit[ment]" (at 9) to entering into jurisdictional agreements is insufficient: Public Law 280 would require the consent of a majority of all enrolled Indians living in the former Creek territory. 25 U.S.C. §§ 1321, 1326. We know of no tribe that has ever consented to such jurisdiction, and the prospect of obtaining a majority vote from all enrolled Indians is dubious. Pet. Reply 4–5. The speculation that Congress could enact legislation to "specifically alter[] the jurisdictional balance" if the decision below stands, Creek Suppl. Br. 10, only highlights the monumental deprivation of state sovereignty the Tribe seeks here.

4. Oklahoma has never "disavowed" that Congress gave the State jurisdiction over eastern Oklahoma, even if the area consists of reservations. Resp. Suppl. Br. 3. Oklahoma's position is that the statutes and historical context prove no reservations exist in eastern Oklahoma. If, counterfactually, reservations remain, then the same statutes confer jurisdiction nonetheless. The United States agrees with the State. U.S. Suppl. Br. 4, 18 n.5. The State's merits brief never disclaims the argument; it simply makes the point that, under *respondent's* theory, every state conviction involving Indians in eastern Oklahoma over the last century is invalid. The State has not abandoned jurisdiction over half its territory.

5. All agree that a federal Indian reservation necessarily qualifies as Indian country for purposes of § 1151(a). The consensus, however, ends there.

Respondent and the Tribe contend that because the federal government maintained a *de minimis* presence in the former Indian Territory post-statehood, the Creek area constituted a reservation. Not so. Appropriations acts from the early 1900s merely provided for federal oversight of the dissolution of the Five Tribes' territories and winding up of tribal affairs; they do not continue "a comprehensive array of ... reservation affairs." Creek Suppl. Br. 25. Notably, none of the indicia of federal superintendence upon which respondent relies persists today.

Nor does federal enforcement of liquor laws in eastern Oklahoma signify reservation status. Resp. Suppl. Br. 22; Creek Suppl. Br. 22–23. Congress prohibited certain liquor transactions in the former Indian Territory, *see Ex parte Webb*, 225 U.S. 663, 691 (1912), as it frequently did on *former* reservation land, *see Dick v. United States*, 208 U.S. 340, 352–55 (1908).

Respondent and the Tribe cite *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915), to suggest that the United States continued to prosecute liquor offenses in the former Creek territory because it viewed the entire area, including Tulsa, as Indian country. Resp. Suppl. Br. 22; Creek Suppl. Br. 23–24. But the United States did not defend, and the Court did not uphold, the indictment in *Joplin* on that theory. *Joplin*, 236 U.S. at 548; U.S. Br. at 12, *Joplin Mercantile Co. v. United States*, No. 648 (U.S. 1910).[7]

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[7] In eastern Oklahoma, several liquor prohibitions were potentially applicable to liquor transactions. *Webb*, 225 U.S. at 691. Thus, federal indictments for liquor trafficking sometimes re-

Courts soon clarified that the general federal prohibition on importing liquor into "Indian country" did not apply to non-Indian owned land in Oklahoma, such as town sites, and thus was subject to a parcel-by-parcel analysis. *See, e.g.*, *Swafford v. United States*, 25 F.2d 581, 583 (8th Cir. 1928); *Evans v. Victor*, 204 F. 361, 365 (8th Cir. 1913).

Here's the relevant takeaway: after statehood, the former Indian Territory was a checkerboard of federal, state, and tribal jurisdiction. Countless judicial opinions spanning decades analyzed whether particular plots of land were Indian country. Those fact-intensive disputes would have been pointless had the *entire area* been reservation land, rendering it automatically Indian country. *See* Pet. Br. 44–46. Respondent's briefing has consistently ignored the import of these cases—four generations of jurists understood that no reservations in the former Indian Territory survived statehood. Sometimes the most obvious and common-sense conclusion is the right one: there are no reservations in eastern Oklahoma today.

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flected confusion as to the appropriate charge for a given act. *See, e.g.*, *Lewellen v. United States*, 223 F. 18, 20 (8th Cir. 1915).

CONCLUSION

The decision below should be reversed.

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January 11, 2019

APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

July 11, 1941

MEMORANDUM for the Commissioner
of Indian Affairs.

The attached letter to the Attorney General in response to his letter of April 28 provides a comprehensive statement concerning State and Federal jurisdiction over that part of Oklahoma which was formerly the Indian Territority. I am not satisfied, however, with the statements at the close of the letter concerning State and Federal jurisdiction in the remainder of the State of Oklahoma. I am, therefore, returning the letter for further consideration and elaboration of that part of the letter.

The statement concerning present jurisdiction in the former Indian Territory concludes that all offenses by or against Indians are subject to State laws. Such a statement is justified, I believe, in view of the acts of Congress cited in the letter and in the supplementary memorandum, particularly the acts abolishing tribal courts and placing criminal jurisdiction over the Indians in the Federal courts at the time of the establishment of the Indian Territory, the proviso in the 1906 act excluding the application of that act to the Indian Territory, and the subsequent transfer of jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma.

The statements on page five of the letter concerning present jurisdiction in the former Territory of Oklahoma suggest that the State has concurrent jurisdiction with the Federal Government over crimes by and against Indians defined by Federal law and complete jurisdiction over other crimes by and against Indians. This statement is not supported by the acts cited in the letter or in the supplementary memorandum. There was no law abolishing the jurisdiction of the tribes over their own members in the Territory of Oklahoma. In fact, the tribal jurisdiction was recognised in the establishment of the Territory of Oklahoma. There has been no law disclaiming Federal jurisdiction over the Indians in that area such as the proviso in the 1906 act with respect to the Indian Territory. This implication in the limited wording of the Oklahoma Enabling Act is not sufficient, in my opinion, to constitute a relinquishment of Federal jurisdiction, particularly in view of section 1 of the Enabling Act which provides that Federal authority over the Indians should not be impaired. In the case of *United States* v. *Ramsey*, 271 U.S. 467, the Supreme Court stated that Federal authority with respect to crimes committed by or against Indians "continued after the admission of the State as it was before." (Page 469.) The case of *Ex Parte Nowabbi*, 61 P.(2d) 1139, which analyses at considerable length the law governing jurisdiction in Oklahoma of crimes by and against Indians, expressly finds that restricted allotments in the former Territory of Oklahoma are still Indian country as that term is used in the Federal statutes by virtue particularly of the main provisions of the 1906 act.

I see no compelling reason why this Department should suggest that, as a matter of law, restricted Indian land in Oklahoma outside the former Indian

Territory is not Indian country to the same extent as restricted Indian lands in other States. You will note that the chief counsel of your office, in his informal memorandum of June 9, concurs in the opinion that such lands are still Indian country. If you wish to propose as an administrative recommendation that a different result be brought about, by legislation if necessary, there would be no objection to requesting the assistance of the Department of Justice to that end.

Please note the minor pencil corrections on pages four and five of the letter.

(Sgd.) FELIX S. COHEN

Acting Solicitor.

Attachment.

Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, WARDEN,
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v.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTRODUCTION

The briefing on the Supplemental Questions confirms that the Court cannot reimpose Respondent's death sentence based on either. On the second Question, everyone (including Oklahoma) agrees that federal reservations are always "Indian country" under § 1151(a). Nothing else need be said.

The first Question requires little more discussion. To begin, Oklahoma continues (at 11) to disavow reliance on it—as Oklahoma did below, at the petition stage, and in merits briefing. Resp. Supp. Br. 3-4. Thus, whatever the Court might say about the relief available to other defendants, the Court cannot reverse the Tenth Circuit's decision here.

Regardless, the first Question provides no basis to reverse. The United States' core theory is this: before statehood, Congress subjected Indians and non-Indians to "the same laws" and the "same court," and after statehood, Congress did nothing to "reinstate ... distinctions" between Indians and others.

But as was true with disestablishment, what this story misses is statutory text. When Oklahoma became a State, the Major Crimes Act gave the federal government exclusive jurisdiction over qualifying Indian crimes on "any Indian reservation" in "any State." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. That statute dictates distinctions between Indians and non-Indians. No further congressional action was required. To be sure, Congress can override the Act, and it has done so repeatedly—each time "expressly provid[ing]" for State jurisdiction over reservations, and each time

speaking in the clear language necessary to effect such a jurisdictional shift. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (1973); Resp. Supp. Br. 5-6. But no such clear language appears in the United States' decade-long statutory story; indeed, the statutes confirm that federal jurisdiction remained intact.

Nor can Oklahoma gain by employing its brief (at 8-17, 19) principally as sur-reply to oral argument and using fearmongering to argue for disestablishment. Oklahoma's claims are vastly exaggerated, and they are (in any event) for Congress, not this Court. They thus provide no reason to discard the separation-of-powers principle this Court has upheld from *Celestine* to *Parker*: When Congress establishes a reservation, only Congress can disestablish. And only clear statutory text will do.

ARGUMENT: NO STATUTE GIVES OKLAHOMA JURISDICTION TO PROSECUTE INDIANS FOR CRIMES ON RESERVATIONS.

Arkansas law. The United States' story is that, from 1897 to 1904, Congress eliminated distinctions between Indians and non-Indians in Indian Territory—applying to Indians "local laws" and "subject[ing]" them to "the same laws and ... same court" as non-Indians. Then, at statehood, Congress supposedly failed to enact legislation to reinstate those distinctions—hence, Oklahoma today has jurisdiction over Indian crimes on reservations.

This argument is wrong because its *framework* is wrong, ignoring the statutes that control. The text of statutes like the Major Crimes Act created distinctions

between Indians and others in States, and those statutes applied of their own force. No other congressional statute needed to "reinstate" such distinctions. And no statute (or series of statutes) overrode the distinctions Congress had created.

Statutory text aside, the United States' story is pure invention. For one thing, its claims about "local laws" are false. When Congress in 1897 eliminated tribal courts and limited the enforceability of tribal laws, it replaced these tribal courts with *federal* "United States Courts" and those tribal laws with *federal* law—namely "the laws of the United States and the State of Arkansas," with the latter as "incorporated" "federal law." Resp. Supp. Br. 10-11. This pre-statehood *expansion* of federal jurisdiction was nothing like subjecting Indian Territory Indians to state law and certainly did not effect a post-statehood *repeal* of federal jurisdiction.

Nor does the United States' story benefit from legislative history (at 5, 7, 9) reflecting the hostility of some members of Congress to tribes and tribal courts. The question here is whether Congress diminished *federal* authority. And Congress responded to concerns about tribal law and courts by expanding federal law and courts—as other legislative history demonstrates. 29 Cong. Rec. 2341 (1897) (Sen. Vilas) ("I should be much better satisfied to have the United States judges administer the laws"); *id.* at 2342 (Sen. Bate) (laws administered "by judges whom we have sent there").

The United States' argument is particularly misguided given its concession that the Major Crimes Act (and General Crimes Act) *in particular* applied in the Indian Territory beginning in 1890. U.S. Merits Br. App'x 2a-3a. The 1890 Act applied to the Indian Territory general federal law and incorporated Arkansas law (excluding intra-tribal Indian disputes), providing that if those laws defined the same offense, federal definitions "govern[ed]." Resp. Br. 11. The 1897 statute then broadened the application of "the laws of the United States," as well as gap-filling Arkansas law, to Indians. Resp. Supp. Br. 11. It makes no sense to suggest (as the United States does) that this *narrowed* the reach of existing federal laws. "No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but ... it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians." *Washington v. Miller*, 235 U.S. 422, 428 (1914).

Equally mistaken is the United States' reliance on an intuition that, if Indians and non-Indians were subject "to the same criminal laws and ... same courts" before statehood, Congress *must* have continued this one-track jurisdiction after statehood. Statehood *always* created new jurisdictional wedges between Indians and others. The Major Crimes Act does so. In territories, it subjects Indians "to the laws of such Territory relating to [the enumerated] crimes," to "be tried ... in the same courts ... as are all other persons." 23 Stat. 362. So Indians in Oklahoma Territory were tried for Oklahoma Territory murder, in Washington Territory for Washington

murder—in short, "the same criminal laws" in "the same courts" as non-Indians. U.S. Supp. Br. 1; *see Ex parte Gon-shay-ee*, 130 U.S. 343, 352 (1889). But at statehood, the Major Crimes Act enacts "two different legal regimes," U.S. Supp. Br. 6—state law and state courts for non-Indians; federal laws and federal courts for Indians.[1]

More broadly, the rule is that the general "authority of the United States ... to punish crimes ... not committed by or against Indians, [i]s ended by the grant of statehood," but federal "authority in respect of crimes committed by or against Indians continue[s] ... as it was before." *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *see United States v. McBratney*, 104 U.S. 621, 624 (1881). So when Congress has enacted laws governing Indians in States, those statutes may yield "distinctions between Indians and non-Indians," U.S. Supp. Br. 10, absent in territories. Nothing in Congress's pre-statehood statutes created a different rule for Oklahoma.[2]

Transfer. The United States invokes (at 3, 11) the Enabling Act's transfer provision, saying it provided "that Indians and non-Indians were to be treated alike

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[1] The United States invokes citizenship (at 8-9), but that argument fails. *See* Resp. Br. 35.

[2] The Curtis Act's "town site" provisions did not extend state criminal law to Indians. U.S. Supp. Br. 8. Town sites were established under *federal* authority, and towns could only enact ordinances punishable by fines, and only jail offenders (for 30 days) when specifically authorized by statute. *See* Mansfield's Digest of Statutes of Arkansas, ch. 29, §§ 745, 746, 765 (1884).

following statehood." But the text does not say treat Indians and non-Indians "alike." It says treat Oklahoma *and other States* alike. In language the United States and Oklahoma ignore, Congress directed to federal courts prosecutions for crimes "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286 ("1907 Act") (amending Enabling Act § 16) (emphasis added). The United States tells us (at 11) that Congress enacted this language "to fix a drafting error" that could have sent *all* criminal cases to federal court. The point, however, is that when Congress ensured that only *some* cases would be transferred to the State, it identified that subset by specifying that Oklahoma receive only those cases that *other States* would prosecute.

The United States next seeks support from the Enabling Act's supposed identification of "state courts as 'successors' to the United States Court for the Indian Territory." U.S. Supp. Br. 3, 12 (citing *Stewart v. Keyes*, 295 U.S. 403, 409-10 (1935)). But the Act did not say the state courts were "successors" in *all* cases—just in cases transferred to state court. In other instances, it identified *federal* courts as successors. Act of June 16, 1906, ch. 3335, § 17, 34 Stat. 267 (state courts were "successors" in cases "not transferred" to federal court); *id.* § 19 (similar); *id.* § 16 (in cases transferred to federal courts, federal courts were "successor of and [had] all the power of ... Territorial appellate courts"); *see* 1907 Act §§ 1-2 (amending Enabling Act to similarly identify state

courts as successors in cases "not transferred" to federal court).[3]

Oklahoma law. The United States' last statute, the Enabling Act provision making Oklahoma Territory law the post-statehood default, was a standard provision Congress used in Montana, Washington, North Dakota, and South Dakota without transferring jurisdiction to States. Resp. Supp. Br. 9. The United States offers no reason the text would yield a different result in Oklahoma. Instead, Congress *preserved* federal authority, and limited state authority, "respecting ... Indians, their lands, property, or other rights," Enabling Act § 1; *see id.* § 3, but not over non-Indians. Resp. Supp. Br. 9-10. Congress reiterated the point in applying Oklahoma Territory law only "as far as applicable," Enabling Act § 13, and in confirming that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States," *id.* § 21. This text maintains, rather than abrogates, the normal rules.

Indeed, the United States' theory is bizarre. It admits that the Major Crimes Act and General Crimes Act applied in Oklahoma Territory before statehood and Western Oklahoma after. U.S. Merits Br. App'x 3a-4a; *see Ramsey*, 271 U.S. at 469. And it contends that Oklahoma Territory law provided the post-statehood

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[3] The Dawes Act amendment the United States invokes (at 10 n.1) excluded the Indian Territory because the Dawes Act did. Pet'r Br. 48. Moreover, continuing federal criminal jurisdiction over Indian reservations did not turn on this amendment. If it did, § 1153 would never apply on "patent[ed]" land. *But see* 18 U.S.C. § 1151(a).

default statewide. But it says that, somehow, neither Act applied in Eastern Oklahoma. The strange consequence of the United States' campaign to create "one system of justice" in Eastern Oklahoma is that "two different legal regimes" would govern post-statehood Oklahoma. U.S. Supp. Br. 4, 6.

Nonexclusivity. Because the Major Crimes Act refutes its argument, the United States muses (at 20) that the Act may not be "exclusive of state jurisdiction." First, this argument is a red herring: Statute aside, Oklahoma lacks criminal jurisdiction due to the "deeply rooted" principle that Indians on reservations are "free from state jurisdiction." *McClanahan*, 411 U.S. at 168 (quotation marks omitted); *see* U.S. Merits Br. 2 ("Absent an Act of Congress to the contrary, federal jurisdiction over crimes involving Indians is exclusive of state jurisdiction."). Second, the Court cannot reverse based on this argument. Oklahoma has disavowed it. Pet. 13 ("Act gives federal courts exclusive jurisdiction"); Pet. 18 (stating the "federal government has exclusive criminal jurisdiction in such cases" and citing § 1153); State CA10 Br. 11 (crimes covered by "Major Crimes Act ... [are] subject to ... exclusive [federal] jurisdiction"). Third, Oklahoma's disavowal was correct: "[T]he text of § 1153, and [this Court's] prior cases make clear" that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction," *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993) (citations omitted)—a holding that has been "a necessary premise" of this Court's decisions, *United States v. John*, 437 U.S. 634, 651 (1978)

(discussing *Seymour*); *see Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

Vintage. The United States claims (at 12) that the statutes it invokes "were consistently interpreted" to grant Oklahoma criminal jurisdiction. But no case addressed the issue for decades. Resp. Supp. Br. 14. And Oklahoma's *exercise* of jurisdiction is no more probative than similar lawless assertions of jurisdiction in Florida, Kansas, Idaho, Michigan, Nebraska, Nevada, Washington, New York, North Carolina, South Dakota, and North Dakota. *Id.* at 13-14.

Nor can the United States gain by citing a 1942 Interior Department memo, four decades after Congress acted. Department lawyers acknowledged "[t]he legal uncertainties ... present" "since statehood" after "the state courts" simply "assumed jurisdiction in the [former] ... Indian Territory." Memorandum for Mr. Flanery from N.A. Gray (Aug. 12, 1942), App'x 1a. The pressure to justify that assumption was palpable—given the "[m]any Indians" who "ha[d] been tried, convicted, sentenced, and executed ... without ... the jurisdictional question being raised." *Id.* Yet Department lawyers thought the "only real solution" to some of Oklahoma's unlawfulness was "legislation." *Id.*; *see* U.S. Merits Br. App'x 5a-6a.

Jurisdictional gap. The United States' claims (at 14) of a "jurisdictional gap" do not advance the ball. Such gaps were common nationwide, including in Iowa, Kansas, New York, and North Dakota. Resp. Supp. Br. 12. Where identified, such gaps were filled by BIA

courts—which the United States admits (at 14 n.13) "a pen stroke" could have extended to Eastern Oklahoma—or express jurisdictional transfers. Resp. Supp. Br. 12. Congress deemed these express transfers necessary because they were the only way to legalize otherwise-unlawful state prosecutions, like Oklahoma's, that proceeded where tribal courts were absent. *Id.* By contrast, if courts judicially *implied* transfers whenever a gap arose, these statutes would be superfluous.

Practicalities. The United States is left to argue consequences, amplified by Oklahoma's sur-reply (at 12-17) re-arguing disestablishment. To begin, *City of Sherrill* is available to address many such consequences, and is purpose-built for the task. Resp. Br. 56. To the extent *statutes* attach consequences to reservation status, the whole point of *Solem* and *Parker* is to reserve *to Congress* the choice of whether to remove lands from the rules Congress has enacted for reservations. Such concerns are no reason to find disestablishment, or imply transfer of federal jurisdiction. If, for example, Congress believes affirmance would result in too broad an application of 18 U.S.C. § 2252A's prohibition on child pornography, Okla. Supp. Br. 14, Congress can act. *Cf.* Former U.S. Att'ys Br. 8-9 (cataloging statutes adjusting criminal jurisdiction).[4] Likewise, if Congress

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[4] Nor is it clear that the statutes Oklahoma cites create practical problems. Most prohibit conduct already illegal in Oklahoma, 21 Okla. Stat. Ann. tit. 21, § 1024.1 (child pornography); are dead letters, *United States v. Torrey Cedar Co.*, 154 F. 263, 266 (C.C.E.D. Wis. 1904) (interpreting earlier version of 18 U.S.C. §1853's tree-destruction prohibition as not applying to allotted lands), *aff'd sub*

agrees with United States' evidence-free claim (at 17-18) that affirmance here would "stretch[] federal resources," Congress will provide more.[5]

Only for existing convictions is there a genuine obstacle to congressional fixes. And there, affirmance need not have any broad effect. The Tenth Circuit has held AEDPA bars virtually all "*Murphy*" challenges. Creek Supp. Br. 12. And contra Oklahoma (at 3 n.1), "apparent procedural bars" exist in state court—laches, which applies to jurisdictional challenges. Creek Supp. Br. 12. More to the point, Oklahoma is free to limit state collateral challenges to the same extent as AEDPA. Resp. Supp. Br. 14. So if challenges that are barred in federal court proceed in state court, that is because Oklahoma has *chosen* to allow them.

Moreover, to the extent these barriers do not hold, the Court's first Supplemental Question does not *avoid* consequences for existing convictions. If Oklahoma-specific statutes eliminate federal jurisdiction over reservations, they do the same for restricted allotments and trust lands, where the United States for decades has prosecuted major crimes. Despite three chances, the

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nom. United States v. Paine Lumber Co., 206 U.S. 467 (1907); do not apply to non-Indians, 6 U.S.C. § 606 (tribal homeland-security grants); are subject to *Montana* and *Sherrill* limitations, 16 U.S.C. §§ 3372(a)(1), 3371(c) (prohibiting violations of "enforceable" tribal rules "to the extent" applicable); or restrict federal authority rather than enhance it, 16 U.S.C. § 3378(c)(3) (federal fish-and-wildlife controls do *not* supersede State authority on reservations).

[5] The United States has abandoned *both* its prior unsourced guesstimates of increased burdens. BIO 33-34.

United States has never explained how to distinguish those lands, lamely asserting (at 17 n.4) over and again that they "are not before the Court." Its theory thus "would open the door to litigation by defendants challenging" decades of convictions. Okla. Supp. Br. 12; *e.g.*, *United States v. Williston*, CR-14-85-RAW (E.D. Okla. Dec. 21, 2015), ECF No. 142 (§ 1153 conviction for murder during child abuse). Indeed, because this theory applies to "civil[] laws," U.S. Supp. Br. 10, it could eliminate decades of Creek civil jurisdiction. Concerns about disruption cannot justify departing from the statutory text.

* * *

The United States' brief illustrates why swapping text for story is a bad trade. The United States transforms laws *expanding* federal jurisdiction into *repeals* of federal jurisdiction; rewrites the Enabling Act's directive to treat Oklahoma like *other States* into a command to make Oklahoma *different* from any State; disavows *Negonsott*, *John*, *Seymour*, and *Solem*, all of which recognize that Major Crimes Act jurisdiction is exclusive; disavows *Negonsott* again to hypothesize that Oklahoma, not Kansas, received "the first major grant of jurisdiction" over crimes on Indian reservations; and draws nonexistent distinctions to suggest that, somehow, the federal government might retain jurisdiction over restricted allotments when Congress supposedly transferred to Oklahoma jurisdiction over the entire Indian Territory.

Less contorted answers are at hand. No statute transferred criminal jurisdiction to Oklahoma, just as no statute disestablished the Creek reservation. Federal jurisdiction and the Creek reservation endure.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

August 12, 1942.

MEMORANDUM for Mr. Flannery:

I have examined the attached file and proposed letter to the Attorney General in answer to his Departmental inquiry of April 28, 1941, concerning the jurisdiction of the state courts of Oklahoma over crimes committed by and against Indians on restricted Indian allotments in the areas formerly known as Indian Territory and Oklahoma Territory.

The legal uncertainties which surround the jurisdictional questions have been present since the advent of statehood on November 16, 1907. We all know that as a solution of the problem the state courts have assumed jurisdiction in the territory known as Indian Territory since statehood. Many Indians and white persons living in Indian Territory have been tried, convicted, sentenced, and executed for crimes committed on restricted Indian lands without, so far as I am able to find, the jurisdictional question being raised.

The Indian lands in the western part of the state of Oklahoma, formerly a part of Oklahoma Territory, are in my opinion still Indian country and the jurisdiction of the state courts is lacking. The proposed letter to the Attorney General sets forth the views of this Department and points out the unsettled jurisdictional questions. The only real solution is through legislation. This is indicated in the proposed communication. I feel

that this letter should be signed and forwarded to the Department of Justice and we await their reaction.

/s/

N. A. Gray,
Attorney.

No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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In the Supreme Court of the United States

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SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

Congress disestablished the Creek Nation's historic territory though a series of statutes—enacted between 1890 and statehood in 1907—that, *inter alia*, broke up and allotted nearly all of the Creek Nation's lands, abolished its courts, and greatly circumscribed its governmental authority. Gov't Amicus Br. 6-18. Through those statutes, Congress eliminated distinctions between Indians and non-Indians in preparation for replacing the tribal domains and governmental authority of the Five Tribes with those of a new State. In particular, Congress subjected Indians and non-Indians in the Indian Territory to the same criminal (and civil) laws and prosecution in the same courts. *Id.* at 28-31; Gov't Supp. Br. 4-10.

Respondent and the Creek Nation do not dispute that prior to statehood, Indians in the Indian Territory

were made subject to the same criminal laws and court jurisdiction as non-Indians, who already greatly outnumbered Indians there. Instead, they posit that by admitting Oklahoma to statehood, Congress *sub silentio* reestablished the very jurisdictional distinctions between Indians and non-Indians it had spent the prior two decades eliminating in preparation for statehood. But neither the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, nor any subsequent statute rescinded the preexisting jurisdictional framework. To the contrary, the Enabling Act transferred general criminal jurisdiction over Indians and non-Indians alike to the State. The sea change respondent and the Creek Nation hypothesize went unnoticed by federal and state prosecutors, the courts, and defendants for 111 years. Their argument now would undo more than a century of considered practice by the state and federal governments and create significant uncertainty with respect to both criminal and civil jurisdiction. It should be rejected.

I. OKLAHOMA HAS JURISDICTION OVER RESPONDENT'S CRIME, REGARDLESS OF THE RESERVATION STATUS OF LAND WITHIN THE CREEK NATION'S 1866 TERRITORIAL BOUNDARIES

1. Respondent and the Creek Nation do not dispute that prior to statehood, Congress subjected Indians and non-Indians in the Indian Territory to the same criminal laws and court jurisdiction, "irrespective of race," Act of June 7, 1897, 30 Stat. 83. Instead, they suggest that action was insignificant because the "body of law" applicable to both groups—federal law and "incorporated Arkansas law"—was "federal in character." Creek Nation (Creek) Supp. Br. 4-5.

That misses the critical point: by subjecting Indians to the same laws as non-Indians, abolishing tribal

courts, and providing for cases involving Indians to be tried in the Court for the Indian Territory, Congress enacted into law "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900). Congress thus "removed the essential characteristic of the Indian country"—"the application of tribal laws within the area"—and "superseded" the Indian Major Crimes Act and General Crimes Act there. Gov't Amicus Br. App. 3a; see *Higgins* v. *Brown*, 94 P. 703, 725-727 (Okla. 1908).

2. Thus, by the eve of statehood, non-Indians lived among and greatly outnumbered Indians, and Congress therefore had placed Indians and non-Indians on the same footing with respect to criminal law and jurisdiction. Respondent and the Creek Nation must identify some congressional action altering that status quo. The Enabling Act did not reinstate criminal-law distinctions between Indians and non-Indians that Congress had eliminated specifically in preparation for statehood. It instead extended a uniform body of Oklahoma law in place of Arkansas law over *all* the inhabitants of the former Indian Territory and transferred *all* criminal cases of a local nature there—including those involving Indians—to the new state courts. Gov't Supp. Br. 10-12.

a. Respondent and the Creek Nation suggest that under the Enabling Act, crimes involving Indians should have been tried in federal court, because they arose "under the Constitution, laws, or treaties of the United States." Creek Supp. Br. 7 (quoting Enabling Act § 16, 34 Stat. 276); see Resp. Br. 45. That argument ignores the contemporaneous and century-long practice of federal and state courts and prosecutors. Gov't Supp.

Br. 12-14. And it assumes that the Major Crimes Act and General Crimes Act—which had been superseded in the Indian Territory—sprang back to life at statehood, even though Congress enacted no language to that effect.[1] Moreover, those statutes would not have provided federal jurisdiction over crimes between Indians not enumerated in the Major Crimes Act. See Rev. Stat. §§ 2145, 2146 (1875). Because the tribal courts remained abolished, respondent and the Creek Nation assume that Congress—though long concerned with law-and-order in the Indian Territory—left *no* court with jurisdiction over such crimes. Gov't Supp. Br. 4-7, 14 & n.3.

The argument that cases involving Indians remained "federal" in nature, because Arkansas law applied to them as incorporated federal law, see Resp. Supp. Br. 10-11; Creek Supp. Br. 5, proves too much. Congress similarly applied incorporated Arkansas law to non-Indians in the Indian Territory; no one suggests that all criminal cases involving those individuals were "federal," too. See *Higgins*, 94 P. at 723; cf. *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918). Indeed, had Congress intended for all criminal cases in the Indian Territory to be transferred to federal court, it would not have amended the Enabling Act in 1907. See Gov't Supp. Br. 11-12.

Respondent relies on the 1907 amendment's statement that prosecutions for offenses "which, had they

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[1] Citing *United States* v. *Ramsey*, 271 U.S. 467 (1926), respondent contends (Supp. Br. 7) that the General Crimes Act applied throughout eastern Oklahoma following statehood. But *Ramsey* concerned a restricted allotment in the former Oklahoma Territory, not fee land in the former Indian Territory. 217 U.S. at 468-469.

been committed within a State, would have been cognizable in the Federal courts," should be tried there. Resp. Supp. Br. 8 (emphasis omitted). That language referred to crimes committed in discrete federal enclaves such as forts or arsenals, Gov't Supp. Br. 12-13, not in the entirety of the former Indian Territory that Congress had abolished. It mandated "applying the hypothetical existence of a state to a region that was specifically a territory and subject to special laws as such." *Higgins*, 94 P. at 724. Because "special laws" subjected Indians and non-Indians in the Indian Territory to the same laws and court jurisdiction for crimes of a local nature, such crimes were to be prosecuted "in the state courts as successors" to the Indian Territory courts "in their local capacity." *Id.* at 724-725.

b. No other Enabling Act provision suggests that Congress revived jurisdictional distinctions between Indians and non-Indians at statehood. Respondent observes (Supp. Br. 8-10) that Section 13 extended the laws of the Oklahoma Territory "as far as applicable," 34 Stat. 275, and Section 21 applied the "laws of the United States not locally inapplicable" to the new State, 34 Stat. 278. But even assuming that Congress viewed all the former Indian Territory as reservations in some sense, that statutory language would be an extremely oblique way to reinstate long-eliminated jurisdictional distinctions throughout that vast area. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not * * * hide elephants in mouseholes."). And it would not address non-major crimes between Indians.

Nor did Section 1 of the Enabling Act enact such a transformation; it merely preserved *existing* federal laws and power over Indians and their lands, 34 Stat.

267-268—not over fee lands in the former Indian Territory, such as those at issue here, over which there was and is no federal or tribal Indian-country jurisdiction. So too for Section 3, which provides that the State has no claim to any "right and title" to Indian lands. 34 Stat. 270. Had the Enabling Act required that crimes by or against Indians throughout eastern Oklahoma be tried in federal court, one would expect that at least one Member of Congress would have objected since, for the next century, Oklahoma prosecuted those cases. Yet respondent and the Creek Nation do not identify even a mention of that possibility.

3. Because Oklahoma *already* had jurisdiction over crimes involving Indians in eastern Oklahoma, there was no need for Congress subsequently to grant such jurisdiction to the State, or for Oklahoma to obtain it under Public Law 280.[2] The legislative history of Public Law 280 does not suggest otherwise. The Senate Report's identification of Oklahoma as one of eight States that needed to amend its Constitution to "assume" criminal jurisdiction did not speak to jurisdiction the State already possessed or specifically address the part of the State comprising the former Indian Territory. S. Rep. No. 699, 83d Cong., 1st Sess. 7 (1953). Nor did it correctly describe the Enabling Act, which did not provide for Congress to maintain "absolute jurisdiction and control" over all Indian lands in Oklahoma. *Ibid.* While the Enabling Act contains such a provision

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[2] Respondent notes the Interior Department's 1963 statement that Oklahoma exercised criminal jurisdiction although it "do[es] not have such jurisdiction under a specific Federal statute." Supp. Br. 14 (quoting Gov't Amicus Br. App. 8a). That statement focused on restricted allotments in the former Oklahoma Territory, not fee land in the former Indian Territory. Gov't Amicus Br. App. 4a, 8a-9a.

regarding another potential State, § 25, 34 Stat. 279, it required Oklahoma to "forever disclaim all right and title" to public and Indian lands, but mandated continued federal jurisdiction only over public lands, § 3, 34 Stat. 270; see Okla. Const. Art. I, § 3; see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). And a later compilation for the Senate Judiciary Committee stated that Oklahoma has jurisdiction over crimes involving Indians "pursuant to various Federal statutes." *Jurisdiction on Indian Reservations: Hearings on S. 1181, S. 1722, and S. 2832 Before the Senate Comm. on Indian Affairs*, 96th Cong., 2d Sess. 30, 34 (1980).

4. The Creek Nation effectively acknowledges (Supp. Br. 9) that affirmance would constitute a sea change by "committ[ing] to consummat[e] appropriate jurisdictional agreements" under Public Law 280. That ignores the enormity of the task. Since 1968, state assumptions of jurisdiction under Public Law 280 have required Indian consent by majority vote; in the intervening half-century, "[o]nly one state acceptance has occurred * * * , and no tribes in that state have consented to the state's jurisdiction." *Cohen's Handbook of Federal Indian Law* § 6.04[3][a], at 538 (Nell Jessup Newton et al. eds., 2012 ed.). Even if the Creek Nation could ensure the consent of its members, that would leave the others of the Five Tribes, for which no one has identified a material difference regarding reservation status.

The Creek Nation's assurances also could not reinstate the many state convictions that affirmance would imperil. While respondent and the Creek Nation suggest that the United States may retry defendants whose state convictions are vacated, they ignore statutes of

limitations, stale evidence, impacts on victims, and limited federal resources. Nor do state and federal habeas defenses necessarily solve the problem. Oklahoma does not share the Creek Nation's optimism that the State has meritorious defenses to state habeas relief, 11/27/18 Oral Arg. Tr. 76; if Oklahoma is correct, the availability of relief under 28 U.S.C. 2254—which, at a minimum, would yield significant litigation—is irrelevant.

It is similarly inadequate to suggest that Congress may simply "pass legislation specifically altering the jurisdictional balance." Creek Supp. Br. 10. Affirmance of the Tenth Circuit's ruling that there is a present-day Creek Reservation over which the State lacks criminal jurisdiction would dramatically alter the status quo. At the same time, reversal on the ground that the State retained jurisdiction over respondent's crime, regardless of reservation status, would yield many open questions and encourage challenges to federal convictions, obtained since the early 1990s, for crimes occurring on restricted allotments. See Pet. Supp. Br. 13-17. Those issues would be difficult to resolve through legislation alone. This Court should not leave it to Congress to enact Oklahoma-specific fixes (where possible) for each particular disruption. It should recognize that Congress *already* has spoken by abolishing the Creek Nation's former territory. Such a ruling would preserve the status quo governing eastern Oklahoma for more than a century (and, with respect to restricted allotments, since the early 1990s). Gov't Supp. Br. 18 n.5; Pet. Supp. Br. 8-12.

II. THE CREEK NATION'S FORMER TERRITORY IS NOT "UNDER THE JURISDICTION OF THE UNITED STATES GOVERNMENT"

1. All agree there are no circumstances relevant here in which land constitutes a federal reservation but does not qualify as "Indian country" under 18 U.S.C. 1151(a). Gov't Supp. Br. 18-19; Pet. Supp. Br. 17-18; Resp. Supp. Br. 16-21; Creek Supp. Br. 14-20. As the United States has explained, however (Supp. Br. 19-21), the Major Crimes Act's reference, since 1948, to "Indian country," 18 U.S.C. 1153(a), does not suggest that Congress intended implicitly to replace the more specific jurisdictional framework governing eastern Oklahoma with exclusive federal jurisdiction over major crimes committed by Indians throughout that area.[3]

2. Respondent (Supp. Br. 21-23) and the Creek Nation (Supp. Br. 21-25) contend that before and after statehood, Congress exercised jurisdiction over a "Creek reservation." None of their assertions suggests that the United States has exclusive jurisdiction over crimes involving Indians throughout the Creek Nation's former territory, or that it constitutes a present-day reservation where the United States has jurisdiction over vast amounts of fee lands.

a. Respondent and the Creek Nation focus on federal supervision over liquor transactions. Such federal power is derived not from reservation status, but "from various sources," including "the treaty-making power,"

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[3] The same is not necessarily true of remaining restricted allotments. Cf. *State* v. *Klindt*, 782 P. 2d 401, 403 (Okla. Crim. App. 1989) (holding that Oklahoma lacks jurisdiction over crimes committed on such lands based on Congress's 1948 codification of the definition of "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c)).

"the power to regulate commerce with the Indian tribes," and "the plenary authority arising out of its guardianship of the Indians." *United States Express Co.* v. *Friedman*, 191 F. 673, 674 (8th Cir. 1911); see *United States* v. *Nice*, 241 U.S. 591, 597 (1916); *Ex parte Webb*, 225 U.S. 663, 683-684 (1912); Felix S. Cohen, *Handbook of Federal Indian Law* § 2, at 352-353 (1942) (Cohen 1942). Agreements with each of the Five Tribes required the maintenance of federal liquor prohibitions. *Webb*, 225 U.S. at 685. And Congress more generally maintains "[t]he power * * * to prohibit traffic in [intoxicating] liquors with tribal Indians, whether upon or off a reservation." *Perrin* v. *United States*, 232 U.S. 478, 482 (1914); see, *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 554 (1975); Cohen 1942 § 3, at 354 & n.38.[4]

Joplin Mercantile Co. v. *United States*, 236 U.S. 531 (1915), is not to the contrary. The federal indictment there referenced the City of Tulsa as "formerly within and * * * now a part of what is known as the Indian country." *Id.* at 535. But given the indictment's wording, the reference to "Indian country"—which was not yet a statutorily defined term—arguably, if inartfully, referred to *all* of the former Indian Territory, which was subject to an 1895 liquor prohibition. Gov't Br. 9-10, *Joplin*, *supra* (No. 648); see Act of Mar. 1, 1895, § 8, 28 Stat. 697; *Joplin*, 236 U.S. at 536-537. Moreover, in this Court, the United States did not contend that Tulsa constituted "Indian country" after fee patents issued. Instead, it argued—and this Court held—that the

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[4] When Congress repealed liquor prohibitions in the former Indian Territory, Act of Mar. 5, 1934, 48 Stat. 396, the Assistant Attorney General stated that "there are no Indian reservations in the technical sense" in that area. H.R. Rep. No. 715, 73d Cong., 2d Sess. 2 (1934).

indictment sufficiently alleged a conspiracy to introduce liquor into "other parts and portions of that part of Oklahoma which lies within the Indian country." *Joplin*, 236 U.S. at 548; see Gov't *Joplin* Br. 10-12; Gov't *Joplin* Br. in Opp. 5.

b. Respondent and the Creek Nation also rely on the Original Creek Agreement, which permitted the Creek legislature to pass laws "affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof," if "approved by the President of the United States." Act of Mar. 1, 1901, § 42, 31 Stat. 872. But that *limitation* on Creek authority even over *Indian lands* undermines rather than supports the proposition that the Creek Nation (and the United States) maintained authority over non-Indian or other unrestricted *fee lands*—the only lands at issue here.

c. The Act of Mar. 3, 1909, 35 Stat. 805, embodied congressional measures to *wind down* supervision over allotments. It provided that the United States would pay allottees out of the Creek Nation's *own funds* as "a final and conclusive settlement of all claims for the equalization of allotments," and that, as a "condition precedent" to such payments, the Creek legislature would "discharg[e] the United States from all claim and demand on this account." *Ibid.*

d. Finally, federal funding for tribal schools does not suggest continued reservation status. Such funding was "highly necessary" because much of the land in the area was not yet subject to state taxation. *Report of the Commissioner of Indian Affairs* 96 (1907). Further federal funding "prov[ided] for the attendance of children of parents of other than Indian blood," Act of Apr. 30, 1908 (1908 Act), 35 Stat. 91, who, by 1908, comprised

84% of the pupils, *Report of the Commissioner of Indian Affairs* 105 (1908). The "central idea" remained "an early transition from the United States Government to state control." *Id.* at 104; see S. Rep. No. 278, 60th Cong., 1st Sess. 7 (1908). To that end, the 1908 Act required the Interior Department to take possession of all school buildings and furniture "and appraise and sell the same," 35 Stat. 71—hardly the language of a continuing reservation.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2019

Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL REPLY BRIEF FOR *AMICUS CURIAE* MUSCOGEE (CREEK) NATION IN SUPPORT OF RESPONDENT

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ARGUMENT

I. No Statutory Basis Has Been Identified for Oklahoma's Present Exercise of Criminal Jurisdiction over Creek Reservation Indians.

The Nation has found no statute granting Oklahoma jurisdiction over crimes involving Indians within the Creek Reservation. Creek Supp. 1-3. Petitioner and the United States identify no provision approaching the explicit text Congress has employed when accomplishing that goal elsewhere. In lieu of text, they argue that the 1897 and 1904 Acts applied a uniform body of "local" law – civil and criminal – to Indians and non-Indians in the Indian Territory. Because the Enabling Act transferred (their words) "all civil and criminal cases of a local nature" to state courts, it accordingly transferred all Indian cases to them. Petr. Supp. 5-6; US Supp. 7-12. This effort to buttress criminal with civil jurisdictional arguments misapprehends both.

A. Congress Did Not Apply One Body of Law Uniformly to Indians and Non-Indians in the Indian Territory.

Two threshold points are critical. Despite repeated references in the briefing to "local" cases, Congress did not employ that or any equivalent term in the relevant Acts. Nor did those Acts apply state law. They assimilated provisions of Arkansas law as *federal law*. Creek Supp. 4-6. The United States agrees. US Supp. 4. That Congress applied federal law to Indians in the Territory does not remotely

suggest that Congress *divested* federal jurisdiction over Indians upon statehood.

Equally flawed is the claim that the 1897 and 1904 Acts subjected "*all* individuals in the Indian Territory ... to the same substantive laws, both civil and criminal." US Supp. 9-10. The 1897 Act was conditional regarding the Five Tribes, providing that any subsequent agreement would "operate to suspend any provisions of this Act if in conflict therewith as to said nation[.]" 30 Stat. 62, 84. The 1901 Creek Allotment Act and its 1902 Supplement thus "withdrew the lands of the Creeks from the operation" of assimilated Arkansas law not referenced therein. *Marlin v. Lewallen*, 276 U.S. 58, 64-67 (1928). *Accord Longest v. Langford*, 276 U.S. 69, 71 (1928) (Choctaw/Chickasaw agreements).

The same goes for the 1904 Act, which

> fell far short of manifesting a purpose to make [Arkansas laws] effective as against special laws enacted by Congress for particular Indians, such as the agreements with the Creeks.

Marlin, 276 U.S. at 68. *See also Washington v. Miller*, 235 U.S. 422, 428 (1914) (same); *In re Davis' Estate*, 122 P. 547, 549 (Okla. 1912) (1904 Act did not extend Arkansas law to Indians and non-Indians "all alike" as "[b]oth prior and subsequent legislation ... show conclusively that Congress had no such thought").[1]

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[1] Petitioner's selective quotation of *Miller* vastly expands its description of the 1897 Act. *Compare* Petr. Supp. 4 ("displace

In sum, the 1897 and 1904 Acts simply did not operate as claimed.

B. Statehood Did Not Deliver Indians and Non-Indians Alike to State Jurisdiction.

The United States argues that Congress would not have "*sub silentio*" retained jurisdiction over Indians at statehood. US Supp. 3-4. But the Enabling Act's *first sentence* retains federal authority over the "Indians, their lands, property, or other rights ... [as] if this Act had never been passed." § 1, 34 Stat. 267, 267-68. This text – by which "Congress was careful to preserve" its pre-statehood authority "over the Indians," *Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911) – is irreconcilable with the United States' position, and in multiple rounds of briefing neither the government nor Petitioner has ever accounted for it.

Nor have they grappled with the text of the Act's transfer provisions, preferring the atextual refrain that Congress transferred "local" cases to state jurisdiction. In the criminal context, the Act (as amended) transferred to federal court prosecutions for crimes "which, had they been committed within a State, would have been cognizable in the Federal courts[.]" § 1, 34 Stat. 1286, 1287. No one seriously disputes that the Creek Reservation was intact prior to statehood, as *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir.

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the Creek tribal laws") *with* 235 U.S. at 425 ("displace the Creek tribal laws of descent and distribution").

1905), make clear.[2] Creek Br. 13-14. Murder by a Creek citizen within the Reservation, "had [it] been committed within a State," would have unquestionably been subject to the Major Crimes Act, § 9, 23 Stat. 362, 385, and thus properly transferred to federal court.

In the civil context, Petitioner's recitation of state cases involving Indians is again no substitute for text. Petr. Supp. 7; US Supp. 15. Even where Congress confers state jurisdiction over such cases, *e.g.*, 28 U.S.C. § 1360(a) (PL-280), that does not "remotely resembl[e] an intention to confer general state civil regulatory control over Indian reservations." *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976). This Court has indeed long applied the same principles regarding state civil jurisdiction over eastern Oklahoma reservations as elsewhere. *E.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Petitioner nevertheless claims that Congress's intent to subject all persons to the same laws "was reflected throughout the statehood process." Petr. Supp. 7. For this, Petitioner cites *United States v. Allen*, 171 F. 907, 926 (E.D. Okla. 1909) ("[c]ontinued guardianship of the Indians was incompatible" with statehood). But *Allen* was reversed by the Eighth Circuit, which – after describing the district court as

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[2] Petitioner accordingly declined to make such an argument to the Court. Tr. 6:1-2 ("we don't have to give you a date" for disestablishment).

"invent[ing] a new and dangerous canon of statutory interpretation" – explained that Congress knew how to explicitly "renounce[] its own authority over the Indians, and subject[] them to the laws of the state, both civil and criminal." *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910). By contrast,

> [i]n its dealings with the Five Civilized Nations, Congress has been at great pains to indicate a different purpose. Here it has ..., down to ... the provisions which it insisted should be embodied in the [Oklahoma] Constitution ... reserved to itself express authority to pass such laws with respect both to the Indians and their lands ....
>
> ... An intent to destroy th[at] authority ... ought not to be deduced as a mere speculative inference .... Such a radical change of national policy should emanate only from express and unequivocal language.

Id. at 19-20, *aff'd*, *Heckman v. United States*, 224 U.S. 413 (1912).

Petitioner and the United States identify no such language. In sum, their account of a wholesale transfer of criminal and civil jurisdiction to the new State ignores the plain text of the Enabling Act and the limited reach, long recognized by this Court, of the 1897 and 1904 Acts. While the Nation remains committed to forging agreements regarding the optimal allocation of criminal authority on the Reservation, Creek Supp. 9-10, no statutory basis

presently exists for state jurisdiction over crimes involving Indians.

C. Petitioner's Erroneous Arguments About Consequences Cannot Alter the Law.

Petitioner quickly abandons the Court's question, instead pressing arguments about practical consequences. This places the Nation in an awkward position. It does not wish to join Petitioner in flouting this Court's Order. His arguments, moreover, are for Congress, not the courts. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016). But Petitioner makes unsubstantiated claims that the Nation cannot acquiesce in through silence.

1. Petitioner claims the Nation was "false and misleading," Petr. Supp. 8, in stating at argument that disestablishment would significantly impair its governmental activities. Such a charge should not be made lightly, and it lacks basis here. Many of the Nation's programs rely on intergovernmental agreements predicated on an understanding of shared jurisdiction. If this Court eliminates that predicate, the cooperation -- and hence the Nation's governance – will falter.

Policing is a prime example. The critical feature of the cross-deputization agreements, absent from Petitioner's telling, is that they enable officers to react to criminal violations, from investigation to pursuit and arrest, *regardless of the identity of the*

suspect.[3] Should this Court hold the Reservation disestablished, the understanding of shared jurisdiction would be overturned, making it extremely difficult for county and municipal officials to cede authority over their constituents to Nation officers. While Petitioner might contend that this would still be legally possible, his arguments go to practical consequences, and in practical terms disestablishment will doom many of the agreements (terminable upon 60 days' notice).[4]

This is not speculative. While agreements commenced in 2000, Tr. 74:17-18, eleven (including with Tulsa County) arose after the decision below, and their consummation depended on the understanding of shared jurisdiction the decision confirmed.[5] That the Nation's police chief has requested additional funding in light of these developments, Petr. Supp. 11 n.3, hardly suggests an understanding that no Reservation exists.

Family Violence Prevention Program. The Nation's FVPP staff provide supportive services to domestic violence and sexual assault victims in non-Indian homes across the Reservation. Creek Br. 28-29. The agreements allowing them to do so absolutely depend on an understanding of shared jurisdiction. As the Muskogee County District Attorney's Office has stated, FVPP delivers essential services "to child

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[3] http://bit.ly/MCN-crossdep §§ 6(A), 8(A)-(D).

[4] http://bit.ly/MCN-crossdep § 4(B).

[5] http://bit.ly/MCN-Lighthorse.

victims and non-offending family members ... *in rural communities across the eleven counties that comprise the jurisdictional boundaries of the Muscogee (Creek) Nation.*" (emphasis added).[6] Nothing is false or misleading about the critical sense of shared jurisdiction evidenced here.

Infrastructure. Petitioner portrays the Nation as a charity, dispensing dollars for maintenance of "some state- or county-owned roads (typically ones that service tribal facilities such as casinos)[.]" Petr. Supp. 9. This is flatly incorrect. The Nation works with local governments on vital infrastructure throughout the Reservation, setting priorities and allocating responsibilities through intergovernmental agreements, with the Nation often executing projects "cradle-to-grave," from engineering and regulatory review to construction and inspection.[7]

Between 2015 and 2022, only one minor road project will pertain to a Nation casino.[8] Far more typical are a $3 million restoration of Wainwright Road, a major thoroughfare between Muscogee and Okmulgee and the primary access for Wainwright's K-12 school; nearly $2 million in safety improvements to 10th Street, servicing Okfuskee County's K-12 school; and a $3.7 million restoration of K Bar Road, connecting the Nation's Okemah hospital to State

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[6] http://bit.ly/Roberts-Letter.

[7] http://bit.ly/MCN-DOT-Meeting; http://bit.ly/MCN-Transportation-Agreements.

[8] http://bit.ly/MCN-TIP at 11; http://bit.ly/TransProjects.

Highway 27.[9] Petitioner's suggestion that the Nation could engage in the intensive intergovernmental cooperation necessary for these projects absent an understanding of shared jurisdiction is simply fanciful.

The claim that the Nation receives funding for such projects "precisely because" it occupies a "*former* reservation in Oklahoma," Petr. Supp. 9, is likewise baffling. Petitioner's cited statutes include funding for *existing* as well as former reservations, with no pigeonholing of the Nation into the latter. *E.g.*, 25 U.S.C. § 1603(16)(A) ("'reservation' means a reservation ... of any Indian tribe"); 25 U.S.C. § 3202(9) (same). *Compare* 113 Stat. 979 (1999) (referencing "former Indian reservation[s]" of several Oklahoma tribes excluding the Nation).

The predicate of shared jurisdiction undergirds the Nation's governmental activities in numerous other areas, ranging from education (where it provides policy and technical assistance and specialists in schools throughout the Reservation) to the provision of social services.[10] There is no question that disestablishment would have significant destabilizing consequences.[11]

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[9] http://bit.ly/MCN-Transportation-Agreements; http://bit.ly/TransProjects.

[10] http://bit.ly/MCN-Education-Programming.

[11] The Nation never implied, Petr. Supp. 10, that its judiciary ignores constraints on tribal adjudicatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*,

2. Equally ill-conceived are Petitioner's claims regarding the consequences of affirmance.

Demographics. The Nation cannot discern a plausible basis for Petitioner's uncited demographic assertions. Petr. Supp. 12. Demonstrably incorrect is his suggestion that Fife is the largest city after Tulsa affected by reservation boundaries. A significant portion of Tacoma, Washington, lies within the Puyallup Reservation, NCAI 32; just as much, but not all, of Tulsa falls within the Creek Reservation. The Puyallup boundaries include the Port of Tacoma – North America's fourth-largest container gateway, facilitating approximately $50 billion in trade annually[12] – and the City and Tribe enjoy an exemplary relationship, *id.* 32-33. More generally, "millions of acres ... [of] non-Indian fee land," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001), exist within reservations, with substantial governmental cooperation benefitting non-Indians and Indians alike, NCAI 27-34.

Taxation. Petitioner has not previously argued that affirmance would threaten budgets, and nothing in the record supports the proposition. What is known is that the Nation *bolsters* state and local budgets through millions of dollars in annual contributions, Creek Br. 26-31, 37, and tellingly not a

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554 U.S. 316, 329-30 (2008). Creek courts exercise jurisdiction throughout the Reservation, and consistent with those constraints, principally do so over tribal citizens and lands.

[12] https://www.portoftacoma.com/100; https://www.portoftacoma.com/about/statistics.

single county or municipality has filed a brief supporting Petitioner. The Nation and State, moreover, have cooperative tax agreements,[13] and are capable of negotiating others. Finally, this Court has never invalidated – under *Bracker* balancing or otherwise – state taxation of non-Indians on reservation fee lands. *Id.* 35-36 & n.33.

Reservation Statutes. Petitioner scrapes the bottom of the barrel here. When even the "compelling" and "justifiable" expectations of non-Indians are matters for Congress alone, *Parker*, 136 S. Ct. at 1082, the purported interest of criminals in engaging in child pornography, domestic violence, and the exploitation of minors free of federal sanction, Petr. Supp. 13-14, surely has no bearing.

No more convincing is Petitioner's grab-bag of federal civil provisions, Petr. Supp. 15 & nn.6-7, apparently designed to unsettle but in truth containing no explanation as to how provisions for homeland security funding, water quality improvement loans and the like (many of them applicable regardless) will disrupt "the daily lives of citizens," *id.* 15. *See also* Resp. Supp. Reply at 10 n.4.

Liquor Regulation. Reservation status does not authorize unilateral regulation of liquor retailers. Even if interested, the Nation could only regulate non-Indian liquor retailers outside of "fee-patented lands in non-Indian communities or rights-of-way through [the] reservation[]," 18 U.S.C. § 1154(c), and then only with Secretarial approval, *id.* § 1161. Petitioner's

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[13] http://bit.ly/MCN-Fuel; http://bit.ly/MCN-Tobacco.

claim rings particularly hollow given the State's demonstrated ability, as in so many other areas, to forge cooperative agreements with tribes.[14]

Gaming. Petitioner did not raise this issue before, presumably because the Nation already operates eight gaming sites in a saturated market under a revenue-sharing Compact with the State. Tr. 72:12-15. If the State is now concerned about additional facilities, that Compact, last amended in August 2018, is subject to renegotiation in 2020.[15]

ICWA. Affirmance will not invalidate ICWA placements. The State, Nation and local agencies and courts enjoy a highly successful partnership. Creek Br. 36-37. Under the federal and Oklahoma Indian Child Welfare Acts, 25 U.S.C. §§ 1911(c), 1912(a); Okla. Stat. tit. 10, § 40.4, the Nation intervenes in every child custody proceeding that may result in the termination of parental rights for a Creek child, and those proceedings have "utilize[d] to the maximum extent possible" Nation services in securing appropriate placements. Okla. Stat. tit. 10, § 40.6.

The Nation is committed to preserving current placements, and the means exist to do so. The Nation can establish placement preferences enforceable in state and tribal courts, 25 U.S.C. § 1915(c), including provisions conferring presumptive validity on existing placements under Nation law. In addition, the State and Nation can compact to allocate jurisdiction over

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[14] http://bit.ly/CPN-Liquor-Compact.

[15] http://bit.ly/MCN-Gaming-Compact Part 15(B); http://bit.ly/MCN-Gaming-Compact-Amendment.

custody proceedings, including "concurrent jurisdiction between [them]." 25 U.S.C. § 1919(a); Okla. Stat. tit. 10, § 40.7. Such a compact could recognize continuing state court authority over existing placements. Thus, such placements will be preserved, and the effective intergovernmental partnership will continue. To portend otherwise is simply reckless.

Consistent with *Parker*, this case should not be decided based upon competing pleas about consequences. But if this Court looks in that direction, it should not do so based on Petitioner's exaggerated claims about the consequences of an affirmance, or his efforts to discredit the Nation's legitimate concerns about disestablishment.

II. UNLESS CONGRESS DISESTABLISHES THE CREEK RESERVATION, IT REMAINS INDIAN COUNTRY.

The supplemental briefs are unanimous regarding the Court's second question: all reservations set aside for federally recognized tribes qualify as Indian country under section 1151(a); the phrase "under the jurisdiction of the United States" excludes only state-recognized reservations; and a new category of federal reservations with diminished status would engender significant complications. Petr. Supp. 17-18, 20-21; US Supp. 18-19 & n.6; Resp. Supp. 15-17, 24-25.

Petitioner, however, reiterates the oral argument claim that, for its Reservation to endure, the Nation must demonstrate its authority over *non-Indian-owned fee land* on the Reservation "to the

general exclusion of state jurisdiction." Petr. Supp. 19; Tr. 6:7-10, 10:7-8, 22:8-11. This is an extraordinary argument, because on-reservation "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quotation marks and citation omitted). Conversely, state jurisdiction over non-Indian land is fully consistent with reservation status and commonplace. Creek Br. 34-38. A state's on-reservation authority is generally excluded *only* as to Indians, *see, e.g., Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001), whereas tribal authority "centers on the land held by the tribe and on tribal members," *Plains Commerce Bank*, 554 U.S. at 327. Congress, meanwhile, enjoys broad power to legislate for the benefit of Indians, *United States v. Lara*, 541 U.S. 193, 200 (2004), making reservation status significant for reasons unrelated to jurisdiction (federal or tribal) over non-Indian fee lands. The numerous reservation statutes cited by Petitioner, *see* Petr. Supp. 15 & nn.6-7, well illustrate this point.

Petitioner's argument, then, requires the Nation to demonstrate authority over non-Indian fee lands that it presumptively lacks. The law is not so one-sided, and such a requirement has never played a role in this Court's disestablishment cases. The real test, espoused by this Court for over a century and reiterated so recently in *Parker*, is whether Congress clearly intended to disestablish the Reservation. Petitioner's attempt to substitute a different, impossible-to-meet standard should fare no better

than his other efforts to distract from the absence of the requisite congressional intent in this case.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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January 11, 2019

No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY
(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Oklahoma had criminal jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Nation member committed within the boundaries of the Nation's historic territory because (1) Congress disestablished the historic territory of the Creek Nation such that respondent's crime did not occur within "Indian country" as defined in 18 U.S.C. 1151(a), or (2) if that territory still could be recognized in some sense, Congress nevertheless conferred criminal jurisdiction on Oklahoma without regard to whether the crime occurred within "Indian country."

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In the Supreme Court of the United States

No. 17-1107

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v.

PATRICK DWAYNE MURPHY
(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals held that all lands within the original territory of the Muscogee (Creek) Nation in Oklahoma constitute a present-day "Indian reservation under the jurisdiction of the United States" and therefore qualify as "Indian country" under 18 U.S.C. 1151(a). On that basis, the court held that the federal government, rather than the State, must prosecute crimes committed by or against Indians within that three-million acre area. The United States filed an amicus brief at the petition stage supporting certiorari.

STATEMENT

1. Federal law defines "Indian country" to include "land within the limits of any Indian reservation under

the jurisdiction of the United States." 18 U.S.C. 1151(a).[1] "Criminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citations omitted). Unless Congress has determined otherwise, the federal government generally exercises jurisdiction over crimes committed by or against an Indian in Indian country. See 18 U.S.C. 1152. Offenses by one Indian against the person or property of another Indian within Indian country "typically are subject to the jurisdiction of the concerned Indian Tribe," *Negonsott*, 507 U.S. at 102; see 18 U.S.C. 1152, but the Indian Major Crimes Act, 23 Stat. 385 (18 U.S.C. 1153(a) (Supp. IV 2016)), gives the federal government jurisdiction over certain serious offenses—such as murder, kidnapping, burglary, and robbery—when an Indian is the perpetrator. Absent an Act of Congress to the contrary, federal jurisdiction over crimes involving Indians is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978). Within Indian country, state jurisdiction generally extends to only those state-law crimes committed by non-Indians against other non-Indians and victimless crimes committed by non-Indians. See generally *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

2. a. Respondent is a member of the Creek Nation. He was convicted in Oklahoma state court of the first-degree murder of another member of the Creek Nation,

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[1] "Indian country" also includes "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(b) and (c). Those definitions are not at issue here. See Pet. App. 17a & n.10.

and was sentenced to death. His conviction was affirmed on appeal. 47 P.3d at 877-880, 888.

In his second application for state post-conviction relief, respondent argued for the first time that the federal government had exclusive jurisdiction over his crime because he and the victim were Indians and the crime occurred in Indian country.[2] The Oklahoma Court of Criminal Appeals rejected that argument and affirmed respondent's conviction. Pet. App. 203a, 222a-224a. Respondent sought this Court's review, and in response to the Court's invitation, the United States filed a brief stating its position that Congress abolished the historic territory of the Creek Nation in Oklahoma. U.S. Amicus Br. at 15-20, *Murphy* v. *Oklahoma* (No. 05-10787). This Court denied certiorari. *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007).

b. Respondent sought relief in federal court pursuant to 28 U.S.C. 2254. Pet. App. 135a. The district court denied habeas relief, concluding that a "careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished." *Id.* at 192a.

c. The Tenth Circuit reversed. Pet. App. 1a-133a. Applying the three-part framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court held that respondent's crime occurred in Indian country—and was subject to exclusive federal jurisdiction—because no single Act of Congress "disestablished the Creek Reservation." Pet. App. 95a. In the court's view, the stat-

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[2] Respondent would not be subject to the death penalty in a federal prosecution. See 18 U.S.C. 3598.

utes through which Congress allotted the Creek Nation's lands, abolished its courts, severely limited the powers of its government, and extended the laws of the new State of Oklahoma over the former Indian Territory did not demonstrate congressional intent to disestablish the Nation's historic territory because the statutes lacked "hallmark[]" language present in prior cases finding disestablishment or diminishment of Indian reservations. *Id.* at 96a. The court further reasoned that at *Solem*'s second and third steps, the historical context and subsequent treatment of the land could not "overcome the absence of statutory text." *Id.* at 132a; see *id.* at 119a. The court therefore set aside respondent's conviction. *Id.* at 133a.

SUMMARY OF ARGUMENT

A. The court of appeals' holding that Oklahoma lacked jurisdiction over respondent's crime because it occurred on a present-day Indian reservation is incorrect. Congress disestablished the historic territory of the Creek Nation when, in preparation for and granting Oklahoma statehood, it passed a series of statutes that broke up the Creek Nation's lands, abolished its courts, circumscribed its governmental authority, applied federal and state law to Indians and non-Indians alike in its territory, provided for allotment of almost all of its communal lands to individual tribal members, distributed tribal funds to individual Indians, and set a timetable for dissolution of the Tribe. The statutes enacted by Congress make clear that Congress did not intend for the new State of Oklahoma to include a massive Creek reservation throughout which the Tribe and the federal government would have jurisdiction to the exclusion of the State over all crimes involving Indians.

Congress, the Dawes Commission (which was charged with negotiating with the Tribe, compiling the rolls of tribal members, and making allotments), and members of the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's historic territory and severely limit tribal authority. Subsequent events confirm the point. For nearly a century, both Oklahoma and the United States have treated the statehood-era statutes as having disestablished the Creek Nation's former domain: the State has exercised criminal jurisdiction over offenses committed by Indians on unrestricted fee lands within the Creek Nation's former territory, while the United States has not attempted to exercise such jurisdiction. The crime at issue in this case—which the Oklahoma courts determined occurred on fee lands within the Nation's historic territory, see Pet. App. 219a-222a—did not occur within Indian country.

B. The court of appeals upended the well-established jurisdictional understanding based on a series of errors. The court gave insufficient weight to Congress's clear design in the years before Oklahoma statehood, minimizing Oklahoma's unique history because the statutes through which Congress acted lacked "traditional textual signs" and "hallmarks" of disestablishment. Pet. App. 102a, 107a (citation omitted); see *id.* at 92a. The court also misconstrued references to the Creek Nation's territory and borders and misunderstood Congress's failure to finally dissolve the Creek Nation's government.

C. Even if the Creek Nation's former territory might still be recognized in some sense, Oklahoma would have jurisdiction over respondent's crime. Congress granted

the State jurisdiction to prosecute crimes involving Indians in the former Indian Territory as part of the series of Acts leading to Oklahoma statehood. Nothing in Congress's subsequent enactment of the definition of "Indian country" in Section 1151 in 1948 implicitly repealed that grant of jurisdiction.

ARGUMENT

THE STATE OF OKLAHOMA HAD CRIMINAL JURISDICTION OVER RESPONDENT'S CRIME

A. Congress Abolished The National Territory Of The Creek Nation

This Court's prior disestablishment cases have considered whether Congress disestablished or diminished a reservation through "surplus land Acts" passed in the late 19th and early 20th centuries that opened land to non-Indian settlement. *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). The "touchstone" for the inquiry is "congressional purpose." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994). "Unfortunately," however, "the surplus land Acts themselves seldom detail" whether Congress intended for "opened lands [to] retain[] reservation status." *Solem*, 465 U.S. at 468; see *id.* at 468-469. To "decipher Congress['s] intentions," this Court has considered the language and purpose of the relevant Acts of Congress, the historical context in which they were passed, and the subsequent treatment of the lands. *Solem*, 465 U.S. at 470-472; see also, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343-344; *Hagen*, 510 U.S. at 410-411.

While those same general principles are relevant and support disestablishment here, this case is distinct from those the Court has considered before. This case does

not concern a single surplus land Act in which Congress "merely opened reservation land to settlement," *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016) (quoting *DeCoteau* v. *District Cnty. Court*, 420 U.S. 425, 448 (1975)), or "formally sliced a certain parcel of land off one reservation," *Solem*, 465 U.S. at 468. Congress's goal for the Indian Territory was far more comprehensive: From the late 19th century through Oklahoma statehood in 1907, Congress pursued the creation of a new State by combining the Indian Territory in eastern Oklahoma with the Oklahoma Territory to its west, and by replacing the tribal and federal governments in the former Indian Territory with the government of the new State. Congress determined that this project required, within the Indian Territory, disestablishing the national territories and greatly curtailing the tribal governments of the "Five Tribes" (the Creeks, Cherokees, Chickasaws, Choctaws, and Seminoles) that lived there.

To achieve that transformation, Congress passed a series of statutes in which it abolished the Creek Nation's courts, applied federal and state law to Indians and non-Indians alike in the Nation's territory, provided for the breaking up and allotment of almost all of its communal domain to individual tribal members, and distributed tribal funds to individual Indians. These statutes, properly read in the unique historical context and in light of contemporary understandings and subsequent developments, make clear that Congress did not intend for the new State of Oklahoma to include a massive Creek reservation throughout which the Creek Nation and the United States would exercise jurisdiction.

1. a. In the 1830s, the Creek Nation (like the others of the Five Tribes) was removed from its homeland in the southeastern United States to the then-unsettled region west of Arkansas, in current-day Oklahoma. Unlike many other tribes in the West (including those involved in *Solem* and similar cases), the Creek Nation did not receive its territory as a traditional reservation from the public domain. Rather, the "United States * * * grant[ed] a patent, in fee simple, to the Creek nation of Indians," with the right of perpetual self-government. Treaty of Feb. 14, 1833, U.S.-Creek Nation, art. III, 7 Stat. 419; see *Woodward* v. *de Graffenried*, 238 U.S. 284, 293-294 (1915); *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436-437 (1897).

After the Civil War, the Creek Nation ceded the western portion of its territory (which was later included in the Oklahoma Territory) but retained title to the eastern portion and the right to self-government. Treaty with the Creek Nation of Indians, June 14, 1866, arts. III, X, 14 Stat. 786-789. The United States entered into similar treaties with the others of the Five Tribes. See *Cohen's Handbook of Federal Indian Law* § 4.07[1][a], at 289 (Nell Jessup Newton et al. eds., 2012 ed.) (Cohen).

Congress's original intention to leave the Creek undisturbed in the Indian Territory changed as hundreds of thousands of non-Indian settlers streamed into the area. See *Marlin* v. *Lewallen*, 276 U.S. 58, 61 (1928); see generally S. Rep. No. 377, 53d Cong., 2d Sess. (1894) (1894 Senate Report). The influx of non-Indians into the Indian Territory left the Indians a fraction of the total population. By 1900, it was estimated that more than 300,000 non-Indians and only 86,000 Indians—including approximately 14,000 Creek Nation members—

lived in the Indian Territory. H.R. Rep. No. 1762, 56th Cong., 1st Sess. 1 (1900). By Oklahoma statehood in 1907, more than 700,000 non-Indians lived in the Indian Territory, H.R. Rep. No. 496, 59th Cong., 1st Sess. 9 (1906) (1906 House Report), and its population was only 9.1% Indian, Bureau of the Census, U.S. Dep't of Commerce and Labor, *Population of Oklahoma and Indian Territory* 9 (1907).

Those demographic shifts presented significant challenges. While each of the Five Tribes had its own government and courts, law enforcement became difficult because tribal courts lacked criminal jurisdiction over the increasing non-Indian population. See 1894 Senate Report 7; *Ex parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878). Non-Indians could not own the land on which they lived and worked or had built towns because it was owned communally by the Five Tribes. See H.R. Doc. No. 5, 56th Cong., 1st Sess. 44 (1899); *id.* at 130-131 (Dawes Commission report); 1894 Senate Report 11. Moreover, although each Tribe held its land in communal title for the benefit of all members of the Tribe, "[a] few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, ha[d] in fact become the practical owners of the best and greatest part of these lands." 1894 Senate Report 11.

Congress took the view that the Indians had "invit[ed] white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits." 1894 Senate Report 7. And on that view, the Indians "must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever." *Ibid.*; see *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 448-449 (1899) (quoting 1894 Senate Report).

Congress therefore set out to disestablish the Five Tribes' national territories and prepare the Indian Territory for statehood. From 1870 onward, "[l]egislation to convert" the Indian Territory "into one or more states [was] introduced into every session of Congress." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 2 (1999). Congress believed that substantial "advantages [could] be derived by the Indians as well as the United States by the surrender of [the Five Tribes'] governments and their incorporation into our system." 1894 Senate Report 1; see *id.* at 12 ("It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government can not continue," but must be "abandoned and a better one substituted."); 1906 House Report 7, 13 (similar). Congress thus sought to do something quite different than simply acquiring surplus lands from the Five Tribes and opening them to non-Indian settlement. Instead, Congress envisioned a complete transformation: "the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H.R. Doc. No. 5, 58th Cong., 2d Sess. 214 (1903) (1903 H.R. Doc. 5) (Dawes Commission report).[3]

b. Congress undertook the transformation of the Indian Territory through a series of statutes passed between 1890 and 1907. Taken together and in light of "all

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[3] The Dawes Commission "was in a very real sense 'the eyes and the ears' of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations." *Woodward*, 238 U.S. at 296.

the circumstances," *Hagen*, 510 U.S. at 412, these provisions clearly demonstrate congressional intent to dismantle the Creek Nation's historic territory.

i. In the Act of May 2, 1890 (1890 Act), 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which had been ceded by the Five Tribes following the Civil War. §§ 2-28, 26 Stat. 81-93. The 1890 Act also addressed law-enforcement concerns within the Indian Territory. It expanded the jurisdiction of the United States Court for the Indian Territory, which had been established the previous year, to encompass all criminal and civil cases except those over which the tribal courts had exclusive jurisdiction because both parties were Indians. §§ 29, 31, 26 Stat. 93-94, 96. The 1890 Act further provided that the laws of the United States prohibiting crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were assimilated and extended to the Indian Territory for offenses not otherwise governed by federal law. § 33, 26 Stat. 96-97.

ii. "In the course of time, changing conditions and the great influx of white people into the [Indian] Territory pointed to the necessity of abolishing, if possible, the tribal organizations, and allotting the land in severalty." *Woodward*, 238 U.S. at 294. In 1893, Congress established the Dawes Commission and authorized it to reach agreements with the Five Tribes to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union." Act of Mar. 3, 1893 (1893 Act) § 16, 27 Stat. 645-646; see *Woodward*, 238 U.S. at

295. Congress envisioned that the agreements would "overthrow * * * the communal system of land ownership" and "extinguish[] the tribal titles, either by cession to the United States or by allotment and division in severalty." *Woodward*, 238 U.S. at 294-295; see H.R. Doc. No. 5, 57th Cong., 2d Sess. 9 (1902) (report by the Secretary of the Interior).

The Creek Nation and the other Tribes were reluctant to negotiate, and Congress responded with "strong measures" against them. 35 Cong. Rec. 7204 (1902) (Sen. Stewart). To facilitate allotment, Congress authorized the Dawes Commission to determine citizenship in and fix the final rolls of the Five Tribes. Act of June 10, 1896 (1896 Act), 29 Stat. 339-340. In doing so, Congress declared that it was "the duty of the United States to establish a government in the Indian Territory" to "rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof." 29 Stat. 340.

In 1897, Congress brought Indians in the Indian Territory under the same regime of federal jurisdictional and substantive laws as was applicable to non-Indians. Congress vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (Indian Department Appropriations Act), 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The next year, Congress passed the Curtis Act, 30 Stat. 495, which abolished the tribal courts and

banned the enforcement of tribal law in the United States courts in the Indian Territory. §§ 26, 28, 30 Stat. 504-505. Congressional enactments thus "gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as [non-Indian] persons." *Marlin*, 276 U.S. at 62; see also 31 Cong. Rec. 5593 (1898) (Sen. Bate) (criticizing the Curtis Act for "sweep[ing] all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under [their] treaties. * * * [W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed.").

iii. In 1901, the Creek Nation and the United States entered into the Original Creek Agreement, which provided for the allotment of almost all tribal lands and the termination of the tribal government within five years. Act of Mar. 1, 1901, §§ 3, 6, 46, 31 Stat. 862-863, 872. The Agreement directed the Creek Nation's principal chief to execute a deed to each allottee conveying "all right, title, and interest of the Creek Nation and of all other [Creek] citizens" in the land. § 23, 31 Stat. 868. The principal chief was likewise to execute such a deed for the conveyance of town sites and other lands under the Agreement. *Ibid.* And all such conveyances were to be approved by the Secretary of the Interior, "which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States" in such lands. *Ibid.* For the period before the prescribed dissolution of the tribal government, the Agreement substantially diminished its power, providing that no statute passed by the Creek Nation's council affecting the

lands, money, or property of the Tribe (except for "incidental and salaried expenses") would "be of any validity until approved by the President of the United States." § 42, 31 Stat. 872.

Also in 1901, Congress made Indians in the Indian Territory United States citizens. Act of Mar. 3, 1901, 31 Stat. 1447. Following the Civil War, "[t]he only Indians considered United States citizens by birth under the Constitution had been those not born into membership in a tribe or whose tribe no longer existed as a distinct entity." Cohen § 14.01[3], at 926-927; see *Elk* v. *Wilkins*, 112 U.S. 94, 99-101 (1884). In the Indian Territory, as elsewhere, allotment provided one means of conferring United States citizenship. See 2 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 754 (1984); Indian General Allotment Act § 6, 24 Stat. 390. But Congress in 1901 went further, making "every Indian in [the] Indian Territory" a citizen of the United States, 31 Stat. 1447, more than 20 years before it provided citizenship to all native-born Indians, Act of June 2, 1924, 43 Stat. 253. Congress took that step because "[t]he independent self-government of the Five Tribes ha[d] practically ceased," and "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population [wa]s being rapidly carried out." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900).

In 1902, the United States and the Creek Nation entered into a Supplemental Agreement. It provided that the statutes of Arkansas in effect in the Indian Territory were to govern the descent and distribution of allotments, Act of June 30, 1902, § 6, 32 Stat. 501, and that all funds of the Creek Nation, including grazing taxes collected by the Secretary of the Interior and other

tribal revenues, not needed to equalize the value of allotments among allottees were to be paid out on a per capita basis "on the dissolution of the Creek tribal government," § 14, 32 Stat. 503. See *Marlin*, 276 U.S. at 63 (The 1901 and 1902 Agreements "embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership."); *McDougal* v. *McKay*, 237 U.S. 373, 381 (1915) (Congress "undertook to terminate their government."). Two years later, Congress provided that any surplus lands remaining after each member of the Creek Nation had received his allotment of 160 acres would be sold at public auction. Act of Apr. 21, 1904, 33 Stat. 204. And also in 1904, Congress once again provided that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise.*" Act of Apr. 28, 1904 (1904 Act) § 2, 33 Stat. 573 (emphasis added).

iv. In 1906, Congress passed the Five Tribes Act, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." The Act abolished tribal taxes and directed the Secretary of the Interior to assume control over the collection of all revenues accruing to the Tribes, including those resulting from the sale of any remaining unallotted lands, and (once all claims against a Tribe were paid) to distribute any remaining funds to tribal members on a per capita basis. §§ 11, 17, 28, 34 Stat. 141, 143-144, 148. The Secretary was directed to take possession of and sell all buildings used for tribal purposes and to take over tribal schools until territorial or state schools were established. §§ 10, 15, 34 Stat. 140-141,

143. Due to concerns arising from delays in the allotment and enrollment processes, see pp. 26-27, *infra*, the Act extended the tribal governments "until otherwise provided by law." § 28, 34 Stat. 148. Congress made clear, however, that it continued to intend "dissolution" of the tribal governments. § 11, 34 Stat. 141. Indeed, two years later, Congress directed every officer or representative of those governments, under pain of criminal sanctions, to pay over all tribal monies and to deliver all tribal property, "including the books, documents, records, or any other papers," to the Secretary. Act of May 27, 1908, § 13, 35 Stat. 316.

v. Finally, Congress passed the Oklahoma Enabling Act of 1906, 34 Stat. 267, which authorized the creation of a new State out of the Oklahoma and Indian Territories. The Enabling Act provided that cases arising under federal law that were pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. All other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts of Oklahoma, the "successors" to the United States courts in the Oklahoma and Indian Territories. §§ 16, 17, 20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907 (1907 Act) § 3, 34 Stat. 1286-1288. That category included cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons. See pp. 12, 15, *supra*; pp. 28-31, *infra*. The Enabling Act also extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21,

34 Stat. 268-269, 275, 277-278; see *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1908). The next year, Congress amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not within federal jurisdiction would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat. 1287; see S. Rep. No. 7273, 59th Cong., 2d Sess. 1 (1907).

c. Through these statutes, over the course of two decades, Congress disestablished the historic territory of the Creek Nation and largely eliminated its governmental authority. Unlike this Court's prior cases finding continuing reservations after enactment of surplus land Acts, Congress did not "merely open [the Creek Nation's] land to settlement" by non-Indians and make the proceeds available for the continuing benefit of the Tribe or its members. *Parker*, 136 S. Ct. at 1079 (citation omitted); see, *e.g.*, *Solem*, 465 U.S. at 474-475; *Mattz* v. *Arnett*, 412 U.S. 481, 495-496 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-356 (1962). Rather, Congress broke up the Creek Nation's territory, substituting individual for communal ownership and distributing the proceeds to individual Indians; made members of the Creek Nation citizens of the United States; eliminated the Creek Nation's tribal courts; provided for the dissolution of the tribal government, divestment of tribal property, and distribution of tribal funds; and paved the way for the Indian Territory to join with the Oklahoma Territory in a new State. These statutes clearly demonstrate that Congress did not intend for the area that formerly constituted the Creek Nation's tribal territory to constitute a continuing reservation for governmental or jurisdictional purposes—one that, if combined with the historic

lands of the other Five Tribes, would encompass nearly *half* the State of Oklahoma.

2. Congress, the Dawes Commission, and the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's historic territory. See, *e.g.*, *Hagen*, 510 U.S. at 416-417; *Solem*, 465 U.S. at 471.

a. As discussed above, pp. 6-10, *supra*, Congress concluded that the system of communal land ownership and tribal government was a "complete failure," *Woodward*, 238 U.S. at 296-297, that could "not continue," 1894 Senate Report 12. In light of the large number of non-Indian settlers and what Congress viewed as weaknesses in the Indian governments, Congress determined that change was "imperatively demanded" and that it required breaking up the Creek Nation's lands and "establish[ing] a government over [non-Indians] and Indians of [the Indian] Territory in accordance with the principles of our constitution and laws." *Id.* at 12-13. Congress declared it "the duty of the United States to establish a government in the Indian Territory," 1896 Act, 29 Stat. 340, and created the Dawes Commission to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union," 1893 Act § 16, 27 Stat. 645-646.

b. The Dawes Commission also understood that Congress's goal was not simply to open Indian lands to non-Indian settlement, but rather to "clos[e] the history of these [Indian] nations" by "bring[ing] about such changes as would enable * * * the admission of [a new] State of the Union." H.R. Doc. No. 5, 56th Cong., 2d Sess. 162 (1900). The Commission observed that the "object of Congress from the beginning has been the

dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." 1903 H.R. Doc. 5, at 214; see H.R. Doc. No. 5, 59th Cong., 1st Sess. 224-225 (1905) (recognizing "the effacement of the tribal governments").

c. The Creek Nation, too, recognized that Congress intended to disestablish its historic territory. In 1893, a Creek Chief observed that Congress's "unwavering aim" was to "wipe out the line of political distinction between an Indian citizen and other citizens of the Republic" so that the tribal governments could be "absorbed and become a part of the United States." P. Porter & A.P. McKellop, *Printed Statement of Creek Delegates*, in *Creek Delegation Documents* 1-3 (Feb. 9, 1893), https://digital.libraries.ou.edu/cdm/ref/collection/grayson/id/162. The Creek Nation objected to Congress's proposed "disintegrating" of "the land of our people" so that it could "be transformed into a State of the Union," which would mean "the civil death of the Muscogee Nation." Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897). The Creek sought simply to "preserve[] unimpaired" their "chief safeguard, the national title to the land patented to us," until they had negotiated an agreement to ensure that they were not "overwhelmed by an alien and strange population at the first election" and then "robbed by State taxation" and "oppressed by discriminating laws" when "the [Creek] nation ceases." *Id.* at 1-2.

3. Subsequent events underscore that Congress disestablished the Creek Nation's historic territory. See, *e.g.*, *Solem*, 465 U.S. at 471.

a. "Congress's own treatment of the affected area[] * * * in the years immediately following" Oklahoma statehood, *Solem*, 465 U.S. at 471, confirms that Congress did not intend for the Creek Nation's historic territory to constitute a continuing reservation. Congress enacted several statutes eliminating certain restrictions on the alienation of Creek allotments and subjecting restricted lands to state-court jurisdiction. *E.g.*, Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239-240; Act of Aug. 4, 1947, 61 Stat. 731. Those provisions would make little sense if Congress intended to preserve the entire Indian Territory—including *unrestricted* lands—as federal Indian country.

Moreover, Congress expressly recognized that the Five Tribes were not living on reservations. It excluded Oklahoma from the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq.*, because that Act "was more adapted to Indian[s] living on reservations, * * * and not Indians [in Oklahoma] residing on allotments." *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 9 (1935); see S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (recognizing, in connection with the Oklahoma Indian Welfare Act, 25 U.S.C. 5201 *et seq.*, that "all Indian reservations as such have ceased to exist"). In 1942, the Assistant Secretary of the Interior likewise opined that as a result of statutes culminating in the Enabling Act, the "Indian reservations" in the "Indian Territory * * * ha[ve] lost their character as Indian country." App., *infra*, 4a. Subsequently, Congress has repeatedly defined "[r]eserva-

tion" for specific statutory purposes to encompass "*former* Indian reservations in Oklahoma." 25 U.S.C. 1452(d) (emphasis added).[4]

b. This Court's decisions underscore that the Creek Nation's historic territory does not constitute a "reservation" for governmental purposes today. In *Washington* v. *Miller*, 235 U.S. 422 (1914), the Court described a Creek allotment as "lands within what until recently was the Creek Nation in the Indian Territory." *Id.* at 423; see also *Woodward*, 238 U.S. at 285 (referring to land in Muskogee County as "formerly part of the domain of the Creek Nation"). In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court noted that while some "Indian tribes [are] separate political entities with all the rights of independent status," that "condition * * * has not existed for many years in the State of Oklahoma." *Id.* at 602. Members of the Five Tribes, the Court explained, "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603. Thus, the Court noted, "Oklahoma supplies for them and their children schools, roads, *courts*, *police protection* and all the other benefits of an ordered society." *Id.* at 608-609 (emphasis added).

c. The manner in which "local judicial authorities" treated the land, *Solem*, 465 U.S. at 471, confirms that Congress disestablished the Creek Nation's historic territory. Immediately following statehood—and for a century thereafter—the United States and Oklahoma

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[4] Accord, *e.g.*, 12 U.S.C. 4702(11); 25 U.S.C. 2020(d)(1) and (2), 2719(a)(2)(A)(i), 3103(12), 3202(9); 29 U.S.C. 741(d) (Supp. IV 2016); 33 U.S.C. 1377(c) (Supp. IV 2016); 42 U.S.C. 2992c(2), 5318(n)(2); see also Cohen § 4.07[1][b], at 292 n.41.

operated on the understanding that the State had jurisdiction to try offenses committed by Indians within the historic boundaries of the Creek Nation, with the exception, since the late 1980s, of trust lands and the remaining restricted allotments, which comprise less than five percent of the land within the Creek Nation's historic territory. See pp. 29-33, *infra*. Oklahoma's continuous "assumption of jurisdiction over the territory * * * further reinforces" that the Creek Nation's historic territory was disestablished. *Yankton Sioux Tribe*, 522 U.S. at 357.[5]

B. The Court Of Appeals' Contrary Holding Rests On Several Errors

The decision below would upend that hundred-year history. The court of appeals held that Congress never disestablished the Creek Nation's territory as a governmental or jurisdictional matter, and that the State lacks criminal jurisdiction over crimes committed by or against Indians in a three-million acre area of eastern Oklahoma, including most of the city of Tulsa. That holding, if permitted to stand, would vastly increase the scope of federal and tribal jurisdiction. And if the logic of the decision were extended to the historic territories of each of the Five Tribes, the federal government would have—and the State would lack—criminal jurisdiction over crimes by or against Indians in nearly all of eastern Oklahoma.

The court of appeals reached that conclusion through several errors. In considering the relevant statutes, the

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[5] Demographic evidence also supports disestablishment. See, *e.g.*, *Solem*, 465 U.S. at 471. Even by the time the 1901 Agreement was enacted, more than 75% of the population in the Indian Territory was estimated to be non-Indian. See pp. 8-9, *supra*.

court searched too narrowly for textual "hallmarks" of disestablishment identified in this Court's surplus-land Act cases, failing to recognize that the ultimate "touchstone" is "congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. The court of appeals also misconstrued references to the Creek Nation and misinterpreted Congress's failure to finally terminate the tribal government.

1. The court of appeals faulted the State for failing to point to a particular statutory provision containing what it termed the "traditional textual signs" of disestablishment, such as the words "public domain," or "cede," or the provision of "a lump-sum payment." Pet. App. 59a, 76a, 102a (citation omitted); see *id.* at 74a-76a, 95a. In contrast, the court observed, prior treaties with the Creek, which had resulted in its removal to the Indian Territory and its sale of the western portion of its lands following the Civil War, had used language of cession and provided for sum-certain payments. *Id.* at 99a-100a; see *id.* at 97a-98a (noting examples involving other tribes).

The court of appeals' analysis does not withstand scrutiny. While certain phrases may suggest diminishment, this Court has made clear that Congress need not use any particular phrasing. See, *e.g.*, *Hagen*, 510 U.S. at 411-412 (rejecting "clear-statement rule" that would have required specific language to show diminishment). The absence of specific language does not "command a determination that reservation status survives in the face of congressionally manifested intent to the contrary." *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587 (1977).

Rejection of a magic-words approach makes particular sense in the unique historical context of Oklahoma.

Congress sought not to open Indian lands to non-Indian settlement (which already predominated in the Indian Territory), but instead to break up the Creek Nation's domain, eliminate its courts, and provide for the dissolution of its government, the divestment of its property, and the distribution of its funds in order to prepare the territory for creation of a new State. In that context, the phrase "public domain," language of cession, and the provision of "a lump-sum payment," Pet. App. 59a, 76a, 102a (citation omitted), would have been inappropriate.

"In the 19th century, to restore land to the public domain was to extinguish the land's prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes." *Parker*, 136 S. Ct. 1079. Here, however, the Creek Nation's historic territory was not "reserved" from the "public domain" in the first place; it was held by the Tribe in fee simple. See p. 8, *supra*. And in connection with Oklahoma statehood, the land was not returned to the United States; the land or its proceeds were distributed among tribal members. Language of cession to the United States thus also would have been inapposite. Instead, the 1901 Agreement provided for the Creek Nation to convey "all right, title and interest" directly to the allottees, grantees of town sites, or other recipients of conveyances. See § 23, 31 Stat. 868. And to the extent language of cession in surplus land cases can also connote a relinquishment of tribal governmental authority over the land, see *Rosebud Sioux Tribe*, 430 U.S. at 597-598, here, Congress expressly removed almost all of the Creek Nation's governmental power over its territory through a series of statutes, and the 1901 Agreement itself provided for

dissolution of the Tribe. The phrases "lump sum payment," Pet. App. 76a, and "sum certain," *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 798, likewise could have had no application. Those phrases denote "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Solem*, 465 U.S. at 470. But Congress did not purchase communal land from the Creek Nation in order to open it to non-Indian settlement; instead, it broke up the Creek Nation's domain, allotting almost all of its land directly to individual tribal members, distributing any additional proceeds to those individuals, and providing for dissolution of the government to which a "lump sum payment" might have been made. See generally pp. 10-18, *supra*.

2. The court of appeals also relied on a handful of references to the Creek Nation's territory or boundaries in the Oklahoma Enabling Act and subsequent legislation. Pet. App. 101a; see Br. in Opp. 10. But while the Enabling Act created an electoral district comprising "all the territory now constituting the Cherokee, Creek, and Seminole nations," § 6, 34 Stat. 271-272, that reference simply used the Creek Nation as a convenient geographic description, rather than as an expression of congressional intent that the territories would continue after statehood as domains under the jurisdiction of the Tribes and the United States. Cf. *Yankton Sioux Tribe*, 522 U.S. at 355-356 (declining to decide whether "references to the Yankton Reservation in legislative and administrative materials" were "a convenient geographical description" or "a considered jurisdictional statement"). And while some maps produced by the Interior Department labeled the Indian Territory as including reservations until 1914, J.A. Vol. II, as of 1919 the Department's maps made clear that the former Indian

Territory did not include any reservations, Records of the Bureau of Indian Affairs, *Central Map File, Record Grp. 75.26, Entry 414 (Administrative Maps), Indian Reservations West of the Mississippi River* (1919), goo.gl/1v64Ec.

The court of appeals further relied (Pet. App. 101a) on a provision in a 1906 appropriations act that defined the boundary line between "the Creek Nation" and "the Territory of Oklahoma." Act of June 21, 1906, 34 Stat. 364. But that reference resolved old business. Prior to the Enabling Act's passage, the Secretary of the Interior had informed Congress that as a result of "erroneous surveys" in the late 19th century, the Creek Nation was "entitled to payment for all land between [a particular] line * * * as surveyed" and "the line as it should have been run." S. Rep. No. 2561, 59th Cong., 1st Sess. 54 (1906). Congress's correction of a survey line first drawn in 1871 does not undermine its longstanding intent to disestablish the Creek Nation's boundaries.

3. The court of appeals also found it significant that the pre-statehood statutes did not ultimately terminate the Creek Nation's tribal government. Pet. App. 93a, 105a-107a. While the Original Creek Agreement provided that the government would expire on March 4, 1906, Congress later extended that deadline indefinitely in the Five Tribes Act. § 28, 34 Stat. 148.

The Five Tribes Act does not demonstrate congressional intent to restore full governmental authority to the Tribes or extend their governments in perpetuity, much less to treat their former territories as reservations under tribal and federal jurisdiction. Instead, it reflects more practical considerations. With the deadline for termination of the tribal governments looming,

allotment was incomplete and title to some land remained in the Tribes. 40 Cong. Rec. 2975-2976 (1906) (Sen. Teller). Moreover, in 1866, Congress had granted several railroad companies a right-of-way across the Indian Territory. Act of July 25, 1866, § 9, 14 Stat. 238. Congress was concerned that if the Indian title was extinguished prior to allotment, such that the land became "public lands of the United States," title would vest automatically in the railroads, *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1129 (D.D.C. 1976) (citation omitted), aff'd, 581 F.2d 949 (D.C. Cir. 1978); see generally 40 Cong. Rec. 2973-2978. The right-of-way covered millions of dollars' worth of coal lands. See S. Doc. No. 213, 56th Cong., 2d Sess. 25 (1901); 40 Cong. Rec. at 2975-2976 (Sen. Teller). Congress thus extended the tribal governments to ensure that the process of conveyances by the Tribes to allottees could be completed and that the valuable coal lands would not automatically revert to the railroads as a "gift"—not because it had abandoned its plans for breaking up the Creek Nation's territory and tribal governance of it. 40 Cong. Rec. at 2974 (Sen. Bailey); see *Harjo*, 420 F. Supp. at 1129.

In the years that followed, Congress failed to set a new deadline for terminating the tribal governments. And, decades later, as part of a broader shift in Indian policy, it authorized the Tribes to re-form governments and reconstitute tribal courts. Oklahoma Indian Welfare Act, 25 U.S.C. 5203; see *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1443-1447 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). But that restoration did not detract from Congress's statehood-era intent to disestablish the territory of the Creek Nation or reconstitute that territory.

C. The State Of Oklahoma In Any Event Had Jurisdiction Over Respondent's Crime

Even if the former territory of the Creek Nation might still be recognized in some sense, Oklahoma would have criminal jurisdiction over respondent's crime. The statutory history of Oklahoma jurisdiction over crimes involving Indians in the former Indian Territory is unique. In the run-up to Oklahoma statehood, Congress enacted statutes to treat Indians the same as non-Indians in the Indian Territory. And then, upon Oklahoma's admission to the Union, it subjected Indians as well as non-Indians to state law, including state criminal law. Nothing in Congress's subsequent enactment in 1948 of the general definition of "Indian country" to include "Indian reservation[s] under the jurisdiction of the United States," 18 U.S.C. 1151(a), reveals an intent to implicitly repeal the relevant Acts of Congress and divest state jurisdiction.

1. Four of the Acts discussed above are especially significant to Oklahoma's criminal jurisdiction over crimes involving Indians. First, in 1897, Congress granted the United States courts in the Indian Territory "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" involving offenses by "any person" "irrespective of race." Indian Department Appropriations Act, 30 Stat. 83. The goal was "to place Indians upon precisely the same plane as the [non-Indians], giving them the same rights" under the law. 29 Cong. Rec. 2324 (1897) (Sen. Berry); see *id.* at 2305 (Sen. Vest) (similar).

Second, the Curtis Act "abolished" "all tribal courts in Indian Territory" and provided that "the laws of the various tribes or nations of Indians shall not be enforced

at law or in equity by the courts of the United States in the Indian Territory." §§ 26, 28, 30 Stat. 504.

Third, the 1904 Act confirmed that the application of Arkansas law "embrace[d] all persons and estates in [the Indian] Territory, whether Indian, freedman, or otherwise." § 2, 33 Stat. 573.

Fourth, the Enabling Act extended the territorial laws in force in the Oklahoma Territory over the entire State. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935); *Jefferson*, 247 U.S. at 292-293. The Enabling Act also sent pending criminal cases that did not arise under federal law—*i.e.*, cases of a local nature—to the new Oklahoma state courts. §§ 16, 20, 34 Stat. 276, 277. The Enabling Act thus brought the members of the Five Tribes under the jurisdiction and substantive laws of the State. The next year, Congress amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not within federal jurisdiction would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat. 1287.

2. After statehood, the federal and state courts consistently interpreted these Acts to confer broad criminal jurisdiction on the State. The sole judge of the new United States District Court of the Eastern District of Oklahoma ordered that "all prisoners" then awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); see *Many May Escape Law*, Mus-

kogee Times-Democrat, Dec. 4, 1907, at 1. The Supreme Court of Oklahoma held that state courts had assumed jurisdiction of all crimes "not of a federal character" in the former Indian Territory, which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Ex parte Buchanen*, 94 P. at 944. Oklahoma state courts regularly exercised criminal jurisdiction over crimes involving Indians in the former Indian Territory. *E.g.*, *McGlassen* v. *State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913); *Rollen* v. *State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912); see Pet. Br. 39-42.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), also reflects the understanding that the State obtained general criminal jurisdiction over Indians in the former Indian Territory. There, an Indian defendant indicted for murder prior to statehood had successfully moved to transfer his case from the Court for the Indian Territory to a federal court in Texas, under a special statute to protect against bias. Following statehood, he contended that the Enabling Act required the transfer of his case to state court in Oklahoma. This Court rejected that argument, concluding that the pre-statehood statute continued to authorize the defendant's prosecution in the Texas court. *Id.* at 90-91. But the Court did not question the premise of the defendant's argument that criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court.

3. If state courts did not have jurisdiction over crimes committed by Indians against other Indians fol-

lowing statehood, then *no court* would have had jurisdiction over most such crimes. Federal jurisdiction over such crimes was limited to listed major crimes, Indian Major Crimes Act § 9, 23 Stat. 385, and the tribal courts, which would have had jurisdiction over non-major crimes, had been abolished since 1898. Thus, if the decision below were correct, then from statehood through the reestablishment of the tribal courts years later, see *Hodel*, 851 F.2d at 1443-1447, no court would have had jurisdiction over non-major crimes committed by Indians against other Indians in the former Indian Territory.

4. The statutory definition of "Indian country," which includes "land within the limits of any reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code in 1948. Act of June 25, 1948, 62 Stat. 757 (18 U.S.C. 1151). That general provision does not specifically address or aptly describe the unique status of the former Indian Territory. And there is no indication that Congress intended to implicitly repeal the existing jurisdictional framework there. See, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted).[6]

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[6] The Secretary of the Interior reached a similar conclusion in a 1963 opinion, stating that codification of the "Indian country" definition "does not appear to require revision" of the Department's earlier determination that Oklahoma maintained jurisdiction "over offenses committed by and against Indians on restricted allotments" in the former Indian Territory. App., *infra*, 8a.

5. Thus, for 80 years—from Oklahoma statehood until the late 1980s—the United States and Oklahoma understood that the State had jurisdiction over crimes involving Indians throughout the former Indian Territory. The state courts regularly exercised that jurisdiction, and the issue appeared settled in 1936, when the Oklahoma Court of Criminal Appeals held (albeit on a different theory) that the State had jurisdiction over the murder of one Choctaw Indian by another on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156.

In the late 1980s, however, the Oklahoma courts held that the State "does not have jurisdiction over crimes committed by or against an Indian" on restricted allotments within the former Indian Territory. *State* v. *Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989). *Klindt* rejected *Nowabbi*'s reasoning and found that any "existing doubts" were "extinguish[ed] * * * in favor of federal jurisdiction" in 1948, *id.* at 404, when Congress defined "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c). Accord *Cravatt* v. *State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State* v. *Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1031 (1989). In 1992, the Tenth Circuit agreed. *United States* v. *Sands*, 968 F.2d 1058, 1061-1063, cert. denied, 506 U.S. 1056 (1993).

In its amicus brief in support of certiorari in *Brooks* (No. 88-1147), and in its response to the certiorari petition in *Sands* (No. 92-6105), the United States argued that the State had jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. This Court, however, denied the petitions, and the United

States has exercised jurisdiction over crimes committed by or against Indians on trust lands and restricted allotments in the former Indian Territory since 1992. See U.S. Br. at 15 & n.8, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787) (declining to urge the Court to grant certiorari on this issue).

Because the Tenth Circuit did not address petitioner's allotment theory, see Pet. App. 17a & n.10, there is no occasion for the Court to address the United States' jurisdiction over trust lands and restricted allotments in this case. This Court can and should consider, however, the government's position that even if Congress did not entirely eliminate any recognition of the former territory of the Creek Nation, Congress did grant Oklahoma criminal jurisdiction over those lands, and that the 1948 definition of "Indian country" to include Indian reservations did not implicitly repeal that jurisdiction with respect to lands that are not trust lands or restricted allotments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2018

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81), the whole area was known as the Indian Territory. During this period the Government recognized the ex-

clusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U.S.C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson*, 40 Fed. 372. C.C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown v. United States*, 146 Fed. 975 (C.C.A. 8th, 1906)). As Territorial courts

they could enforce section 548 of title 18 by the trial of the Indians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently acquired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States v. Ramsey*, 271 U.S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi*, 61 P.(2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by Indians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions

as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.
CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or

permitting tribes to petition for such jurisdiction, or providing local option for the assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore, the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians appropriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self- government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agree-

able with you and whichever officials for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755

No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* DAVID BOREN, BRAD HENRY, TOM COLE, NEAL MCCALEB, DANNY HILLIARD, KRIS STEELE, DANIEL BOREN, T.W. SHANNON, LISA JOHNSON BILLY, THE CHICKASAW NATION, AND THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici have a practical, close-up understanding of the jurisdictional concerns state and tribal authorities face in eastern Oklahoma and hands-on experience in resolving such concerns through tribal-state agreements in areas such as taxation of motor fuel and tobacco, Indian gaming, transportation funding, and policing. The *amici* are the Chickasaw Nation and Choctaw Nation of Oklahoma ("*amici* Nations"), both federally recognized Indian tribes, 83 Fed. Reg. 4235, 4239 (Jan. 30, 2018), and several former officials of the State of Oklahoma. David Boren[2] and Charles "Brad" Henry[3] served as Governor of Oklahoma. The Honorable Thomas "Tom" Cole, United States Representative, served as Oklahoma Secretary of State during the administration of Governor Frank Keating, when many of the foundational tribal-state compacts

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief as reflected in correspondence filed with the clerk.

[2] Mr. Boren was Governor from 1975-1979. He also represented Oklahoma in the United States Senate from 1979-1994, where he served on the Senate Indian Affairs Committee. Mr. Boren earlier served in the Oklahoma House of Representatives from 1967-1975, and was President of the University of Oklahoma from 1994-2018.

[3] Mr. Henry was Governor from 2003-2011. He also served in the Oklahoma Senate from 1992-2003, and was chair of the Judiciary Committee and vice-chair of the Economic Development Committee. He is currently an attorney in private practice.

were negotiated.[4] The leadership experience of these amici on tribal-state issues is extensive. Neal McCaleb has served in several official capacities, including as Oklahoma Secretary of Transportation, and as Director of the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority.[5] During that time, he worked extensively on joint state and tribal funding of transportation projects. Other *amici* served in the Oklahoma legislature when the State and the *amici* Nations negotiated agreements addressing jurisdiction and governance in Eastern Oklahoma. Former Speaker Pro Tempore Danny Hilliard served in the Oklahoma House of Representatives when the Oklahoma tribes and the State developed a solution to the taxation of tobacco and motor fuel sales in Indian country in Oklahoma. This solution rested on the State's enactment of legislation authorizing the State to negotiate compacts with tribes to allocate

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[4] Congressman Cole served as Oklahoma Secretary of State from 1995-1999, after serving in the Oklahoma Senate from 1988-1991. He has represented the fourth congressional district in the United States House of Representatives since 2003. His district covers a portion of the Chickasaw Nation's Reservation. He is a citizen of the Chickasaw Nation.

[5] Mr. McCaleb served as Secretary of Transportation from 1987-1991, and again from 1995-2001. During the latter period he concurrently served as Director of the Department of Transportation and as Director of the Turnpike Authority. He served in the Oklahoma House of Representatives from 1975-1983 and was House Minority Leader from 1979-1983. He served as Assistant Secretary of the Interior—Indian Affairs, United States Department of the Interior, from 2001-2003. Mr. McCaleb has been the Chickasaw Nation's Ambassador-at-Large to the United States since 2013 and is the Chairman and Director of Chickasaw Nation Industries, Inc., a Chickasaw Nation-owned corporation that promotes tribal economic development. He is a citizen of the Chickasaw Nation.

revenue from those sales. This model solution has been in place ever since.[6] And Mr. Hilliard, former Speaker Michael "Kris" Steele,[7] and Daniel "Dan" Boren,[8] all served in the Oklahoma House when the State developed its model Indian gaming compact, under which Oklahoma tribes have operated since 2004. Each also served in the Oklahoma House when the State negotiated numerous cross-deputization agreements and motor vehicle licensing compacts with Oklahoma tribes, as did former House Speaker

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[6] Mr. Hilliard served in the Oklahoma House of Representatives from 1990-2004, and was Speaker Pro Tempore from 2003-2004, as well as House Majority Leader and Chairman of the Subcommittee on Appropriations. He served as Executive Officer and Vice President for External Relations and Planning for the University of Oklahoma from 2004-2015. He is currently Vice President of Corporate Development and Tourism for the Chickasaw Nation.

[7] Mr. Steele served in the Oklahoma House of Representatives from 2001-2013. He was Speaker from 2011-2012 and Speaker Pro Tempore from 2009-2011. He is currently a member of the Oklahoma Pardon and Parole Board.

[8] Mr. Boren served in the Oklahoma House of Representatives from 2002-2004. From 2005-2013, he represented Oklahoma's second congressional district—which includes a significant portion of eastern Oklahoma and the Five Tribes' Reservations—in the United States House of Representatives. He is currently President of Corporate Development for the Chickasaw Nation.

Tahrohon Wayne "T.W." Shannon[9] and Lisa Johnson Billy.[10]

Amici's interest, like that of the Muscogee (Creek) Nation ("Creek Nation"), *see* Creek Nation Br. at 1, is in refuting Petitioner's and his supporting *amici*'s assertions that the decision below will have immediate, wide-ranging, and damaging impacts across eastern Oklahoma. *See* Pet. Br. at 3; States' Br. at 20-21; Okla. Indep. Petrol. Ass'n ("OIPA") Br. at 29-32; Envtl. Fed'n of Okla. ("EFO") Br. at 8-9. *Amici*'s experience shows those assertions are implausible. For more than two decades, the *amici* Nations' sovereign authority within their Reservation and commitment to the cooperative exercise of that authority has provided the framework for the negotiation of agreements with the State that provide legal and economic stability and a better quality of life for all Oklahomans. That manifest experience, unlike Petitioner's and his *amici*'s speculative parade of horribles, is the only reasonable basis for assessing the likely prospective impact of affirmance of the decision of the court below, which

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[9] Mr. Shannon served in the Oklahoma House of Representatives from 2007-2015, where he was Speaker from 2013-2014 and Chairman of the Transportation Committee. He is currently President of Bank2, a full-service bank owned by the Chickasaw Nation. Mr. Shannon is a citizen of the Chickasaw Nation.

[10] Ms. Billy served in the Oklahoma House of Representatives from 2004-2016 and sat on the Joint Committee on State-Tribal Relations, which reviews tribal-state agreements, including cross-deputization agreements, gaming compacts, and motor vehicle licensing compacts. She served in the Chickasaw Nation Tribal Legislature from 1996-2002, and from 2016 to the present. She is a citizen of the Chickasaw Nation.

correctly held that the Creek Reservation continues to exist.

SUMMARY OF ARGUMENT

The *amici* Nations' and Creek Nation's exercise of sovereignty on their respective Reservations has been good for Oklahoma. In one area after another—taxation, gaming, motor vehicle registration, law enforcement, and water rights—the Nations' sovereignty within their Reservation and the State's recognition of that sovereignty have provided the framework for the negotiation of inter-governmental agreements that benefit all Oklahomans. The only reasonable expectation of affirmance is a continuation of that success; conversely, the only reasonable expectation of Petitioner's hyperbolic bid for reversal would be damage to the decades-in-the-making fabric of inter-governmental agreements that have served Oklahoma and its economy well, while enhancing meaningful tribal self-determination. We call on the Court to resist that bid and to protect the on-the-ground success of state-tribal relations in Oklahoma.

ARGUMENT

I. OKLAHOMA'S AND THE NATIONS' NEGOTIATED APPROACH TO SETTLING JURISDICTIONAL ISSUES ON THE NATIONS' RESERVATION BENEFITS ALL OKLAHOMANS.

The criminal jurisdiction issue presented in this case is properly resolved by deciding whether the murder for which Respondent was prosecuted occurred in "Indian country," as defined in 18 U.S.C. § 1151(a). And that issue turns on whether the Creek Reservation has been diminished, which Respondent and the

Creek Nation have comprehensively addressed. Petitioner's question presented submits no issue to this Court concerning the civil jurisdiction of the Creek Nation, or of any other of the so-called "Five Civilized Tribes."[11] *See* Pet. Br. at i, 2. And the only question addressed in the proceedings in the courts below concerns the continued legal significance of the Creek Nation's Reservation boundaries for purposes of enforcing criminal law. This case does not call on the Court to consider or address tribal sovereignty in any manner, much less tribal civil regulatory authority over hypothetical subject matter or third parties, though Petitioner and his amici intimate otherwise; nor does it call on the Court to consider, much less address, any questions specific to any other of the Five Tribes' legal histories, sovereign rights and boundaries, or Congress's actions in their regard.[12]

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[11] The Five Civilized Tribes are the Creek, Cherokee, Seminole, Choctaw, and Chickasaw Nations. *Morris v. Watt*, 640 F.2d 404, 408 n.9 (D.C. Cir. 1981) (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976). We refer to these tribes collectively as the "Five Tribes."

[12] While Petitioner seeks to generalize about the treaty rights of the Five Tribes, *see, e.g.*, Pet. Br. at 20, the "argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Under those principles, the Court "examine[s] the historical record and consider[s] the context of the treaty negotiations to discern what the parties intended by their choice of words." *Id.* This case contains no record of the Chickasaw and Choctaw Nations' treaties, which Petitioner references only once, Pet. Br. at 5-6 n.2, and thus provides no basis for asserting that rights held under those treaties have been abrogated. To make that determination would require the Court to "look beyond the written words to the larger context that frames the Treaty,

The limited nature of the question presented notwithstanding, Petitioner and his *amici* argue for reversal by asserting that the decision below has immediate adverse impacts on civil jurisdiction in eastern Oklahoma. *See* Pet. Br. at 4, 56; States' Br. at 20-21; OIPA Br. at 29-32; EFO Br. at 8-9. These arguments are misplaced, first, because the framework for deciding the extent of tribal civil jurisdiction is starkly different from that which determines criminal jurisdiction in Indian country[13] and, second,

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including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) and citing *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999)). Petitioner's generalizations concerning the impact of the Allotment Era legislation fail for similar reasons. Petitioner relies heavily on the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495. *See* Pet. Br. at 10-11. But the Curtis Act contained a separate agreement with the Chickasaw and Choctaw Nations that continued their governments in effect for a period of eight years and superseded any inconsistent provisions of the Curtis Act (except for § 14, which addressed town sites). *Id.* § 29, 30 Stat. at 505-13 (the "Atoka Agreement"). Petitioner cites the Atoka Agreement but once. Pet. Br. at 11 n.3. And while Petitioner also relies on the Five Tribes Act of 1906, ch. 1876, 34 Stat. 137, Congress expressly declared in the Act "[t]hat the tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law." *Id.* § 28, 34 Stat. at 148. The application of that Act therefore requires an understanding of each tribal government's rights at that time, which is lacking here for the Chickasaw and Choctaw Nations for the reasons just stated.

[13] The Indian country status of land is relevant to tribal civil jurisdiction, *see DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 427 n.2 (1975), but the existence of tribal civil jurisdiction over non-Indians is determined under a different framework to which Petitioner and his *amici* give short shrift. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008);

because the Creek and the *amici* Nations have long exercised their sovereignty in a manner that accommodates state and local government interests, enhances economic stability, and protects the rights of non-tribal citizens. Numerous tribal-state intergovernmental agreements that produce positive results for Indians and non-Indians throughout Oklahoma on a daily basis confirm that conclusion, and as the Court weighs its decision in this case, the existence and effect of those agreements should be considered as well.

A. The Nations Provide Governmental Programs and Services Throughout the Reservation.

The *amici* Nations hold their Reservation under treaty with the United States, Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty"), which secured "a tract of country west of the Mississippi River" to the Choctaw Nation to "exist as a nation and live on it," *id.* art. 2, and the "jurisdiction and government" over "all the persons and property" within that Reservation, *id.* art. 4. The Chickasaw Nation secured rights to the Reservation "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws[])" under the Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995). The 1830 Treaty "provide[s] for the [Nations'] sovereignty within Indian country." *Id.* at 466.[14]

Montana v. United States, 450 U.S. 544, 565-66 (1981); *Williams v. Lee*, 358 U.S. 217, 219-21 (1959).

[14] The Nations' 1830 Treaty rights were reaffirmed in the 1855 Treaty of Washington ("1855 Treaty"), arts. 1, 7 June 22, 1855,

The *amici* Nations exercise their inherent and retained sovereignty under constitutions approved by the Secretary of the Interior that describe each Nation's geographic element by reference to treaty-defined boundaries. Chickasaw Const. arts. XII, XIII, *available at* https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US; Choctaw Const. arts. XII, XIII, *available at* https://www.choctawnation.com/sites/default/files/import/Constitution_1983.pdf. For example, the Chickasaw Nation governs within the boundaries described in the 1855 and 1866 Treaties. Chickasaw Const. prmbl. Legislative authority is vested in a Tribal Legislature, elected from districts defined with reference to the Reservation's boundaries, *id.* art. VI, §§ 1, 3. Adjudicatory authority is held by the Judicial Department. *Id.* arts. XII, XIII. The Tribal District Court has territorial jurisdiction over "all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Chickasaw Nation has authority." Chickasaw Code tit. 5, § 5-201.3, *available at* https://code.chickasaw.net/Title-05.aspx. And the Chickasaw Supreme Court has appellate jurisdiction "coextensive with the Chickasaw Nation." Chickasaw Const. amend. V, § 4. Likewise, the Choctaw Nation exercises its treaty right of self-

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11 Stat. 611. By that treaty, a Chickasaw district was established within the Reservation, although the Nations' common ownership of the Reservation remained in force. *Id.* arts. 2, 3. The Nations later entered into the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), in which they "cede[d] to the United States the territory west of the 98[th meridian]," *id.* art. 3, modifying only the Reservation's western boundary, while reaffirming their rights of self-government, *id.* art. 7, and their rights under prior treaties, *id.* arts. 10, 45.

government within the boundaries set forth in the 1855 Treaty. Choctaw Const. art. I, § 2. Legislative authority is vested in a Tribal Council elected from districts defined by reference to the Reservation boundaries, *id.* art. VIII, §§ 1, 2, and judicial authority is vested in the Judicial Department, *id.* arts. XII, XIII. The Choctaw Nation's courts have "general civil and criminal jurisdiction over all tribal Indian Country as described in Article I, Section 2" of the Choctaw Constitution. *See* Choctaw Nation, Res. CB-65-2009, § 1.101 (Apr. 11, 2009), *available at* https://www.choctawnation.com/sites/default/files/Court%20of%20General%20Jurisdiction%20Establishment.pdf.

Like the Creek Nation, the *amici* Nations provide governmental services within their Reservation that benefit Indians and non-Indians. Each maintains a police department that protects public safety.[15] Each provides healthcare services to the public through tribally-run hospitals, clinics, and health centers.[16] The Nations also provide numerous educational ser-

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[15] *See Lighthorse Police*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx (last accessed Sept. 25, 2018).

[16] *Health Facilities*, Choctaw Nation, https://www.choctawnation.com/tribal-services/health-services/health-facilities (last accessed Sept. 10, 2018); *Chickasaw Nation Medical Center*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx (last accessed Sept. 25, 2018).

vices, including childcare and early childhood programs,[17] family support services,[18] summer programs, Adult Education, High School Equivalency certification,[19] vocational rehabilitation programs,[20] a Choctaw language school,[21] and a residential learning center for Native American students.[22] They also provide

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[17] *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx (last accessed Sept. 25, 2018); *Early Childhood*, Choctaw Nation, https://www.choctawnation.com/tribal-services/education/early-childhood (last accessed Sept. 25, 2018).

[18] *Chokka Chaffa' (One Family)*, Chickasaw Nation, https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx (last accessed Sept. 25, 2018).

[19] *Adult Learning Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Adult-Learning-Program.aspx (last accessed Sept. 25, 2018).

[20] *Vocational Rehabilitation*, Chickasaw Nation, https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx (last accessed Sept. 25, 2018).

[21] *School of Choctaw Language*, Choctaw Nation, https://www.choctawnation.com/school-choctaw-language (last accessed Sept. 25, 2018).

[22] *Jones Academy*, Choctaw Nation, https://www.choctawnation.com/jones-academy-0 (last accessed Sept. 25, 2018).

services for substance abuse recovery, family preservation, and family violence prevention,[23] domestic violence shelters, and a group home for Native American children.[24]

Amici Nations also exercise sovereign authority under federal statutes. For example, the Chickasaw Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a).[25] *See* Chickasaw Code tit. 17, § 17-201.7, *available at* https://code.chickasaw.net/Title-17.aspx. And both Nations receive grants from the federal government to exercise their sovereign authority. For instance, they receive Indian Child Welfare Act grants to operate Indian child and family service programs on or near their Indian country. 25 U.S.C. §§ 1903(10), 1931(a). And the federal Department of Justice recently announced that it will award the amici Nations and the Creek Nation millions of dollars in Coordinated Tribal Assistance Solicitation grants to the Nations' law enforcement, to fund programs to expand community policing, prevent and prosecute

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[23] *Children & Family Services*, Choctaw Nation, https://www.choctawnation.com/tribal-services/member-services/children-family-services (last accessed Sept. 25, 2018); *Family Preservation*, Choctaw Nation, https://www.choctawnation.com/family-preservation (last accessed Sept. 25, 2018).

[24] *Chickasaw Children's Village*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Children-s-Village.aspx (last accessed Sept. 25, 2018).

[25] Indian tribes are "jurisdictions" under the Act, *see id.* § 20911(10)(H), if, like the Chickasaw Nation, they elect to maintain a sex offender registry, *id.* § 20929(a)(1)(A).

violence against native women, combat alcohol and substance abuse, and enhance tribal justice systems.[26]

The *amici* Nations' operation of these programs and services ultimately benefits all of eastern Oklahoma. The Nations undertake these governmental operations pursuant to their longstanding and comprehensive conception of tribal sovereignty, which, as expressed in their modern constitutions, is based on boundaries established by treaty. As we discuss next, these and other functions of tribal sovereignty are exercised within the context of cooperative relationships with the State, built on mutual recognitions of state and tribal sovereignty.

B. The *Amici* Nations, the Creek Nation, and the State Have Consistently Resolved Issues of Concern Within the Reservations by Inter-Governmental Agreement.

The State has consistently recognized the Creek and *amici* Nations' sovereignty in clear terms. State policy is to "recognize[] the unique status of Indian tribes within the federal government and ... work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments." Okla. Stat. tit. 74, § 1221(B). The Oklahoma Governor

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[26] Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Will Award Up to $246 Million in Grants to Improve Public Safety in American Indian and Alaska Native Communities (Sept. 19, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-will-award-246-million-grants-improve-public-safety-american-indian-and; Dep't of Justice, *Department of Justice Coordinated Tribal Assistance Solicitation FY 18 Combined Award List* 15-17 (2018), *available at* https://www.justice.gov/tribal/page/file/1095161/download.

and Oklahoma political subdivisions may "negotiate and enter into cooperative agreements" with Indian tribes in the state "to address issues of mutual interest." *Id.* § 1221(C)(1), (D)(1). And several Oklahoma agencies rely on a state-produced map that describes the Reservation boundaries of the Creek and *amici* Nations—among others—as the bounds of their jurisdiction.[27]

State law also recognizes the Creek and *amici* Nations' authority to adjudicate disputes within their Reservation. Oklahoma Supreme Court Rule 30(B), Okla. Stat. tit. 12, ch. 2, App., R. 30(B), provides that

> [t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith and credit under this rule than would a similar or comparable judgment of a sister state.

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[27] *See* Planning & Research Div., Okla. Dep't of Transp., *Tribal Jurisdictions in Oklahoma* (2010), *available at* http://www.okladot.state.ok.us/maps/tribal/2010_Tribal_Jurisdiction_Map.pdf; *Office of Tribal Liaison*, Okla. State Dep't of Health, https://www.ok.gov/health/Organization/Partnerships_for_Health_Improvement/Office_of_Tribal_Liaison/ (last accessed Aug. 22, 2018) (under "Overview" section, follow "Tribal Jurisdiction Map" hyperlink).

See Barrett v. Barrett, 878 P.2d 1051, 1054 (Okla. 1994). Under the Rule, the State has extended full faith and credit to judgments of all of the Five Tribes.[28]

Negotiations between the State and Indian tribes—including the *amici* Nations and the Creek Nation—based on these principles have been successful in a number of areas. The State and the *amici* Nations, for example, negotiated Tobacco Tax Compacts that recognize that under federal law Indian tribes have inherent sovereign rights to pass their own laws and be governed by them.[29] Under these Compacts, the Nation agrees to purchase cigarettes and other tobacco products only from a list of state-licensed wholesalers provided by the State, *e.g.*, Chickasaw-Okla. Tobacco Tax Compact, art. II §§ 2-3, and in lieu of a state tax being levied on tobacco products sold by the Nations on land owned by the Nation or its citizens, the State agrees to share with the Nation a "Compact Payment" equal to the state tax on that product, *id.* §§ 7-8. Thus, the Nations are not freezing the State out of this commerce. *Cf.* EFO Br. at 13.

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[28] *See Full Faith and Credit of Tribal Courts*, Okla. State Cts. Network, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214 (June 25, 2018).

[29] Chickasaw-Okla. Tobacco Tax Compact, art. 1 (Oct. 30, 2013), *available at* https://www.sos.ok.gov/documents/filelog/89572.pdf; Choctaw-Okla. Tobacco Tax Compact (Oct. 31, 2013), *available at* https://www.sos.ok.gov/documents/filelog/89578.pdf. The State first negotiated tobacco compacts with the Five Tribes in the mid-1990s. The State and tribes have successfully re-negotiated their compacts several times since then, including several re-negotiations during *amicus* Brad Henry's administration. *See* Editorial, *New Oklahoma Tobacco Compacts a Step in the Right Direction*, Oklahoman (Aug. 27, 2014), *available at* https://newsok.com/article/5336005/new-oklahoma-tobacco-compacts-a-step-in-the-right-direction.

So too in motor fuel. After this Court held that Oklahoma could not tax the Nations' motor fuel sales in Indian country, *Chickasaw Nation*, 515 U.S. at 455-56, the State enacted a law to "limit[] litigation" by "allow[ing] both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country" under "mutually beneficial agreements." Okla. Stat. tit. 68, § 500.63(A)(4).[30] Tribes that enter such agreements agree to include state taxes in their motor fuel sales in "Indian country," including sales to members, *id.* § 500.63(C)(1), and in exchange receive a portion of those taxes, *id.* § 500.63(C)(2)-(3), which must be used for certain governmental purposes, *id.* § 500.63(C)(5). The *amici* Nations and the Creek Nation have all entered into such agreements.[31]

Gaming is also conducted by tribal-state agreement. Since 1994, the *amici* Nations have engaged in Indian Gaming Regulatory Act ("IGRA") Class III Gaming on Indian lands on the Reservation under Gaming Compacts with the State, *see* 25 U.S.C. § 2710(d)(1)(C), and their tribal codes. They, and the Creek Nation, currently do so under the State's model compact,

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[30] The need for this legislation arose from the potential loss of millions of dollars of motor fuel taxes—which Mr. McCaleb addressed while serving as Transportation Secretary. *See Transportation Head Disputes Tribe's Figures*, Oklahoman (Feb. 10, 1996), *available at* https://newsok.com/article/2530731/transportation-head-disputes-tribes-figures.

[31] Chickasaw Nation-Okla. Motor Fuels Contract (Sept. 26, 1996), *available at* https://www.sos.ok.gov/documents/filelog/50348.pdf; Choctaw Nation-Okla. Motor Fuels Contract (Sept. 30, 1996). The Creek Nation accepted the State's terms by tribal resolution. Muscogee (Creek) Nation, Resolution No. TR 97-19 (Sept. 27, 1997), *available at* https://www.sos.ok.gov/documents/filelog/51327.pdf.

see S.B. 1252, 49th Leg., 2d Reg. Sess. § 22, (Okla. 2004), *available at* https://www.sos.ok.gov/documents/questions/712.pdf ("Model Compact"),[32] which acknowledges that each Tribal Nation is a "federally recognized tribal government possessing sovereign powers and rights of self-government" and that Indian gaming revenues support tribal governmental programs and related economic development in Oklahoma that "extend[s] beyond the tribe's lands ... ."[33]

Motor vehicle registration and license tags for the *amici* Nations' citizens are also governed by Compacts that recognize the *amici* Nations' "inherent sovereign powers of self-government, as secured by and under

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[32] The Nations' past and present gaming compacts are available at *Indian Gaming Compacts*, Office of Indian Gaming, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/gaming-compacts (last accessed Aug. 23, 2018) (select "Oklahoma" under "US State" and then select "Apply"). *Amici* Danny Hilliard, Dan Boren, and Kris Steele all voted on the bill establishing the Model Compact, and *amicus* Mr. Steele participated in the floor debate. Marie Price, *House OKs Gaming Bill*, Tulsa World (Feb. 27, 2004), *available at* https://www.tulsaworld.com/archives/house-oks-gaming-bill/article_8fcb4ce1-ba86-5aeb-bfa9-292a236f929b.html; Amber Esada, *Gaming Bill Passes Through House Floor*, Legislative Update: 49th Oklahoma Legislature Second Session–2004 (Okla. State Regents for Higher Educ., Okla. City, Okla.), Feb. 27, 2004, at 1, *available at* https://www.okhighered.org/leg-info/2004/Update-02-27-04.pdf. *Amicus* Brad Henry signed the bill and was Governor when it was approved in a public referendum. Rhett Morgan, *Tenth Anniversary of Oklahoma's Tribal Gaming Compact Celebrated*, Catoosa World (Nov. 18, 2014), *available at* https://www.tulsaworld.com/communities/catoosa/news/tenth-anniversary-of-oklahoma-s-tribal-gaming-compact-celebrated/article_56e17719-f7c9-5e83-89a5-0b4668f37bbf.html.

[33] Model Compact, pt. 2(1), (5)-(6).

federal law."[34] Under these Compacts the *amici* Nations design Tribe-specific license tags for their members that the State reviews and approves, *e.g.*, Choctaw-Okla. Motor Vehicle Compact, art. II, § 2, and then makes available to eligible *amici* Nation members, *id.* § 5. And the State remits to each amici-Nation 85% of the "basic fees, taxes ... penalties, and fines" that would otherwise go to the State's General Revenue Fund if it produced the tags. *Id.* § 9. The *amici* Nations and the Creek Nation have also negotiated highway improvement agreements with the Oklahoma Department of Transportation[35] that address among other things, signage for the Rising Water Ancient Mountains Scenic Byway,[36] funding for an interchange on Interstate 35 in Chickasaw

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[34] *See* Choctaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Aug. 29, 2014), *available at* https://www.sos.ok.gov/documents/filelog/90157.pdf; Chickasaw-Okla. Motor Vehicle Registration & License Tag Compact, art. I (Oct. 23, 2014), *available at* https://www.sos.ok.gov/documents/filelog/90185.pdf.

[35] Prior to 2012, the State and tribes entered into these agreements under Okla. Stat. tit. 74, § 1221. However, H.R. 2564, 53d Leg., 2d Reg. Sess. (Okla. 2012), which was supported by *amici* Kris Steele, T.W. Shannon, Danny Hilliard, and Lisa Johnson Billy, *see House Votes*, Okla. House of Reps., https://www.okhouse.gov/ 53LEG/okh01465.txt (last accessed Sept. 25, 2018), streamlined the agreement process by exempting some transportation agreements signed after 2012 from § 1221, meaning that they no longer needed to be approved by the legislature's Joint Committee on State-Tribal Relations to become effective. *See* Okla. Stat. tit. 74, § 1221(C)(1), (D)(5).

[36] Chickasaw Nation-Okla. Scenic Byways Project Agreement (Aug. 19, 2011), *available at* https://www.sos.ok.gov/documents/filelog/87956.pdf.

territory,[37] cost sharing for resurfacing highways in Choctaw territory,[38] and the construction and funding of transportation-related tourism attractions in the Creek Reservation.[39]

As these agreements show, the Creek and *amici* Nations are not interested in ousting the State from tax collection, or in unsettling business and consumer expectations arising from State tax rates. *Cf.* EFO Br. at 9-10. Instead, cooperative sovereignty, manifested through a rich fabric of inter-governmental agreements, generates tax revenues that allow the Nations and the State to provide high-quality governmental services throughout the Reservation, which furthers the interests of the Creek Nation, the *amici* Nations, and the State. *Cf.* Int'l Mun. Lawyers Ass'n Br. at 12-18; OIPA Br. at 27. Similarly, the *amici* Nations' overriding interest is in preserving a healthy and productive economic climate for the oil and gas industry in eastern Oklahoma, not in disrupting oil and gas production, *see* OIPA Br. at 29.[40]

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[37] Memo. of Agreement Between Chickasaw Nation & Okla. (Aug. 18, 2011), *available at* https://www.sos.ok.gov/documents/filelog/87955.pdf.

[38] Agreement Between Choctaw Nation of Okla. & Okla. (Aug. 19, 2008), *available at* https://www.sos.ok.gov/documents/filelog/87967.pdf; Intergovernmental Project & Funding Agreement By & Between Okla. Dep't of Transp., & Choctaw Nation of Okla. (Sep. 24, 1998), *available at* https://www.sos.ok.gov/documents/filelog/87964.pdf.

[39] Muscogee (Creek) Nation-Okla. King Coal Depot Tourist Information Ctr. & Transp. Museum Agreement (Oct. 18, 2007), *available at* https://www.sos.ok.gov/documents/filelog/87962.pdf.

[40] Moreover, notwithstanding each *amici* Nation's long-standing and federally approved constitution's affirming geographic self-concepts that are co-extensive with treaty-defined reservation boundaries, neither of the *amici* Nations has enacted

The *amici* Nations' cooperation with State and local governments also enhances policing on the Reservation. Under state law, tribal police who have been commissioned by the Bureau of Indian Affairs ("BIA") and certified by the Council on Law Enforcement Education and Training ("CLEET") "shall have state police powers to enforce state laws" on fee land owned by an Indian tribe, or in Indian country. Okla. Stat. tit. 21, § 99a(D).[41] The *amici* Nations and Creek Nation have negotiated dozens of cross-deputization agreements with municipalities on their Reservations.[42] Under these agreements, tribal law enforcement officers commissioned by the BIA can enforce

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laws or otherwise sought to regulate or tax oil and gas production. Nor has the Creek Nation done so. *See Tribal Codes*, Choctaw Nation, https://www.choctawnation.com/government/judicial-branch/tribal-codes (last accessed Aug. 21, 2018) (providing links to Choctaw laws); Chickasaw Code tit. 15, ch. 5, *available at* https://code.chickasaw.net/Title-15.aspx ("Oil and Gas" chapter reserved with no provisions); Muscogee Code tit. 43, *available at* http://www.creeksupremecourt.com/wp-content/uploads/title43.pdf ("Oil and Gas" title reserved with no provisions).

[41] *Amicus* Lisa Johnson Billy authored the bill that amended § 99a to include this provision for tribal officers, *see* H.R. 1871, 54th Leg., 1st Reg. Sess. (Okla. 2013), and *amicus* T.W. Shannon voted for it, *House Votes*, Okla. House of Reps., https://www.okhouse.gov/54Leg/okh00783.txt (last accessed Sept. 24, 2018). *Amicus* Kris Steele earlier co-authored a bill, S.B. 1208, 49th Leg., 2d Reg. Sess. (Okla. 2004), signed by *amicus* Brad Henry, making it easier for cross-deputized tribal police to obtain CLEET certification. *See Week in Review*, Okla. Sen., http://www.oksenate.gov/news/week_in_review/week_in_review_2004/wir2004030104.html (last accessed Sept. 25, 2018); Travis Snell, *New Oklahoma Law Makes CLEET Certification Easier for Marshals*, Cherokee Phoenix (July 9, 2004), *available at* https://www.cherokeephoenix.org/Article/index/549.

[42] *See Tribal Compacts and Agreements*, Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last accessed Sept.

federal law in Indian country, and if also commissioned by a municipality, can enforce state and local law within that jurisdiction. This *reduces*—not creates—jurisdictional confusion, and enhances public safety.

The State and the *amici* Nations also recently settled a dispute over water rights on the Reservation. *See* State of Okla., Choctaw, Chickasaw, City of Okla. City Water Settlement (Aug. 2016), *available at* https://www.waterunityok.com/media/1075/agreement-160808.pdf ("Settlement"). The Settlement addresses water appropriation and use in the "Settlement Area," defined as bounded by the South Canadian River, the Oklahoma-Texas state line, the Oklahoma-Arkansas state line, and the 98th meridian—that is, the Nations' Reservation. *See* Settlement § 1.58 (defining Settlement Area); 1866 Treaty, art. I (defining patent boundaries); *see also* Settlement § 2.1.1.5 (referencing treaties as source of Nations' claims). Congress approved the Settlement, *see* Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. No. 114-322, § 3608, 130 Stat. 1627, 1796-1814, and that Act expressly recognizes the boundaries of the

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25, 2018) (type "deputization" in "Doc Type" bar and select "Submit"); Tony Choate, *Lighthorse, Narcotics Bureau Ink Cross-Deputization*, Chickasaw Times, June 2007, at 1, 27 (reporting comments of *amici* T.W. Shannon and Lisa Johnson Billy on a Chickasaw-Oklahoma cross-deputization agreement), *available at* http://c919297.r97.cf2.rackcdn.com/i2yujhdnhkyt9oiy4gx5py4kkhqhvq-optimized-pub.pdf; D.E. Smoot, *County and Creek Law Enforcers Approve Agreement*, Muskogee Phoenix (June 11, 2017), *available at* http://www.muskogeephoenix.com/news/county-and-creek-law-enforcers-approve-agreement/article_4d5539fe-69ca-586b-9411-a1a34266a7be.html.

Settlement Area, *id.* § 3608(b)(18), 130 Stat. at 1798-99.

Under the Settlement, the State issues permits and administers water rights in the Settlement Area, Settlement § 5.1, on terms that "enhance water availability for use within the Settlement Area, to support recreation, fish and wildlife needs," *see id.* §§ 5-6, and the Nations secured their rights to existing uses of water and to appropriate water in the future, *id.* § 7. Rather than maximizing their water demand, *see* EFO Br. at 13, the Nations' approach benefits all water users. Indeed, the Settlement expressly affirms as a shared policy objective, "a common interest in in the long-term sustainability of Settlement Area Waters," which *amici* Nations and the State pledge to pursue through coordinated resource planning and study efforts for their mutual benefit throughout the Settlement Area. Settlement § 9.1.2. The Settlement further seeks to implement cooperation on shared sovereign interests. It does so through the establishment of two institutions. First, it creates a Settlement Commission, responsible for evaluating and providing the threshold report on any proposed out-of-state use of Settlement Area Waters. *Id.* §§ 5.3.3.2, 5.3.3.3. Second, it establishes a Water Preservation Infrastructure Fund, which is to be comprised of any revenues that may be derived from an approved out-of-state use of Settlement Area Waters and which may only be expended for purposes of jointly valued projects, i.e., water and wastewater infrastructure throughout the State, *id.* § 5.3.3.5.1, with an express prioritization for projects "located within or serving the Settlement Area," *id.* § 5.3.3.5.2.4.

Among the various fears stoked by certain Petitioner-supporting *amici*, we point particularly to

OIPA's fear that the Creek Nation could seek to preempt state regulation of water quality on the Reservation under the "treatment as a state" ("TAS") provisions of the Clean Water Act, 42 U.S.C. § 7601(d), or the Safe Drinking Water Act, *id.* §§ 300j-11(a), (b)(1), 300h-1(e). *See* OIPA Br. at 27-28. OIPA's argument essentially ignores the fact that federal law already vests Oklahoma with authority to veto any such regulation. Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Pub. L. No. 109-59, 119 Stat. 1144, 1937, provides that when the EPA approves Oklahoma state environmental regulatory plans under federal environmental laws, it must also, if Oklahoma requests, approve "the State to administer the State program in the areas of the State that are in Indian country without any further demonstration of authority by the State." *Id.* § 10211(a). Furthermore, EPA may grant a Tribe TAS only if the State and Tribe have entered a cooperative agreement, approved by EPA, to jointly administer the program. *Id.* § 10211(b)(2).

In sum, the Nations' sovereignty has furthered, not hindered, the interests of the State, local governments, and non-Indians in eastern Oklahoma by strengthening Oklahoma's economy and improving quality of life for Indians and non-Indians alike. Petitioner's *amici*'s fear-ridden mischaracterization of that relationship should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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September 26, 2018

No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA CATTLEMEN'S ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, MAYES COUNTY FARM BUREAU, MUSKOGEE COUNTY FARM BUREAU, OKLAHOMA OIL & GAS ASSOCIATION, AND STATE CHAMBER OF OKLAHOMA IN SUPPORT OF PETITIONER, MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY

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The Environmental Federation of Oklahoma, Inc. (EFO), Oklahoma Cattlemen's Association (OCA), Oklahoma Farm Bureau Legal Foundation (OFBLF), Mayes County Farm Bureau, Muskogee County Farm Bureau (collectively Farm Bureau), Oklahoma Oil & Gas Association (OKOGA), and State Chamber of Oklahoma (SCO) (collectively *Amici*) submit this *amici curiae* brief in support of Petitioner, Mike Carpenter, Interim Warden, Oklahoma State Penitentiary, under Supreme Court Rule 37.[1] The Tenth Circuit Court of Appeals determined the former Creek Nation lands (former Creek territory), established by treaty in 1866, to be a reservation of the Muscogee (Creek) Nation (Nation), never disestablished by Congress. That decision upends over a century of criminal, civil, and regulatory jurisdictional understandings in Oklahoma and ignores long-settled expectations, threatening economically destructive confusion and controversy regarding sovereign rights in Oklahoma. *Amici*'s members are engaged in many of the same activities that helped develop the new State of Oklahoma in the early Twentieth Century, activities governed by Oklahoma law (unless on tribal trust, or, possibly, allotted lands): farming, ranching, oil and gas development, and small and large business operations. They have invested their time and money into their livelihoods, in reliance on the commonly shared understanding of the regulatory, tax, and adjudicatory authority under which they live and operate.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

If not reversed, the decision will cause uncertainty as a new jurisdictional order is imposed. The geographic scope of the former Creek territory covers large portions of Eastern Oklahoma, including much of the city of Tulsa. The decision threatens to authorize tribal taxation of activities and properties, to invest tribal courts with broader jurisdiction, and to authorize greater, and potentially exclusive, tribal and federal regulation over lands and energy resource development. Because the histories of the Cherokee, Chickasaw, Choctaw, and Seminole Tribes or Nations, the other four of the Five Civilized Tribes, are similar in important respects to that of the Nation, the decision may cause redrawing of jurisdictional boundaries across the Eastern half of Oklahoma that was, from 1890 to 1907, the Indian Territory.

INTERESTS OF *AMICI CURIAE*

Amici and their members are affected by the decision below because their members live, own businesses, and have invested in Eastern Oklahoma. *Amici* are non-profit associations or foundations whose members reside or own and operate businesses in the former Creek territory and within areas the decision may imply lie within reservations of others of the Five Civilized Tribes. The decision places at risk long-held understandings regarding the governmental entities with adjudicative, regulatory, and legislative jurisdiction over *Amici*'s members, their businesses, and their investments.

A. Environmental Federation of Oklahoma, Inc.

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies.

Its membership includes over eighty company, affiliate, associate, and appendix affiliate members. EFO works to ensure that environmental regulations are clear and consistent and properly balance the need for environmental regulation with the interest of responsible economic growth. EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation, will be hurt by the decision if the Nation or the federal government seeks to impose tribal or federal regulations, including, if permitted, environmental regulation, over the activities of non-tribal members on fee-owned lands now within the former Creek territory, or, potentially, that formerly held by the Five Civilized Tribes.

B. Oklahoma Cattlemen's Association

OCA, a non-profit association, was chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Today, the OCA includes cattle raising families in all 77 Oklahoma counties. Within the former Creek territory, OCA is affiliated with local county Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families, OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's beef cattle industry. The decision threatens to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

C. Oklahoma Farm Bureau Legal Foundation and Muskogee and Mayes County Farm Bureaus

OFBLF is a non-profit foundation, incorporated in 2001, that supports the rights and freedoms of farmers and ranchers in Oklahoma, by promoting individual liberties, private property rights, and free enterprise. OFBLF's sole member is the Oklahoma Farm Bureau, Inc. (OKFB), an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB has 82,712 members, representing agricultural producers who grow a variety of crops and livestock, and every size of operation, from small family farms to large commercial ranches and farms. Muskogee and Mayes County Farm Bureaus (together with OFBLF, Farm Bureau) are county affiliates of the OKFB. Muskogee County's 2,019 members farm hay, soybeans, and wheat, and raise laying hens and cattle. Mayes County's 1,111 members primarily farm soybeans, hay, and wheat, and raise cattle and broilers. Farm Bureau's mission is to improve the lives of rural Oklahomans by analyzing their problems and formulating action to achieve educational improvement, economic opportunity, social advancement, and to promote the general well-being of the United States. It is non-partisan and non-sectarian.

A significant number of OKFB's members are in counties that are fully or partially within the former Creek territory: as of July 23, 2018, 13,498 OKFB member families are in Creek, Hughes, McIntosh, Mayes, Muskogee, Okfuskee, Okmulgee, Rogers, Seminole, Tulsa, and Wagoner Counties. While some of Farm Bureau's members may also be Nation members or members of others of the Five Civilized Tribes, Farm Bureau members who are not tribal

members will lack political or legal remedies to address potential grievances caused by new Nation, Five Civilized Tribe, or federal assertions of legal, taxation, regulatory and adjudicatory jurisdiction, grounded in previously unheralded reservation status of the former Creek territory.

D. Oklahoma Oil & Gas Association

OKOGA was formed in 1919 as the Mid-Continent Oil and Gas Association, and is one of the oldest oil and gas industry associations in the United States. OKOGA is a non-profit association composed of oil and natural gas producers, operators, purchasers, pipelines, transporters, processors, refiners, marketers, and service companies which represent a substantial sector of the oil and natural gas industry within Oklahoma. OKOGA's membership also includes the state's largest pipeline, gathering, and processing companies, and all four refiners in the state.

OKOGA addresses industry issues of concern and works toward the advancement and improvement of the domestic oil and gas industry. The activities of OKOGA include support for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the State and throughout the United States. Members of OKOGA own or operate oil and gas operations in the counties within the former Creek territory, and within former territories of others of the Five Civilized Tribes. The decision impairs their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

E. State Chamber of Oklahoma

SCO is Oklahoma's statewide chamber of commerce. It represents over 1,500 Oklahoma businesses and their 350,000 employees. It has been the State's leading advocate for business since 1926. SCO provides a voice for Oklahoma businesses and their employees to the executive, legislative, and judicial branches of government, and is in a unique position to advise the Court of the impact of the civil implications of the regulatory, taxation, and economic development consequences of the decision on its members' interests, and its potential effect on business development within the former Creek territory.

SUMMARY OF ARGUMENT

This brief offers three primary arguments to assist the Court in ruling on the issues raised in this case. First, the brief discusses the potential civil jurisdictional consequences if the decision below is affirmed. Second, the brief explores whether the Tenth Circuit was correct in applying the *Solem v. Bartlett*, 465 U.S. 463 (1984), test to the Nation, as dismantlement of the Nation's landholdings and most government functions was not accomplished by a surplus land act. Third, the brief argues that the decision below erred in its application of *Solem*, ignoring Congress' unambiguous intent as expressed in statutory language, contemporaneous understanding of the effects of Congressional acts, and later understanding of government authority in Eastern Oklahoma.

ARGUMENT

Amici are Oklahoma farmers, ranchers, oil and gas developers, and business owners; they and others in similar businesses developed Oklahoma. Some have interests dating to the days when what is now Eastern Oklahoma was the Indian Territory. All are regulated by, comply with laws promulgated by, and pay taxes to the State of Oklahoma, its counties and municipalities, and, where relevant, the United States, and have done so since Statehood in 1907. While acknowledging the unique, and sometimes troubled, history of the former Oklahoma Indian Territory, none of *Amici* or their members have ever believed they were living, working, or owning businesses or land within the boundaries of a current Native American reservation—until the decision below issued. If not reversed, the decision could damage *Amici*'s member businesses and families, and the business and legal environment in the Nation's pre-Statehood territory, and overturn expectations across the lands of the others of the Five Civilized Tribes.

I. THE TENTH CIRCUIT FAILED TO ADDRESS THE FUNDAMENTAL CIVIL JURISDICTIONAL CONSEQUENCES OF ITS DECISION.

The decision below has direct and staggering consequences to criminal jurisdiction in Eastern Oklahoma. Just as confounding are the civil consequences that will directly affect *Amici* and their members. Equally troubling is that the Tenth Circuit reached its conclusion without addressing Oklahomans' reliance on longstanding understandings and expectations regarding, or the effect of its ruling on, civil jurisdiction. If allowed to stand, the ruling provides a basis for the Nation, and potentially the others of the

Five Civilized Tribes, to assert tax and regulatory jurisdiction, and for the tribes, and their members by suing in tribal court, to assert adjudicatory jurisdiction over *Amici*'s member families, businesses, and property. This potentially duplicative and inconsistent regulation and jurisdiction undermine legal foundations underlying private property and investment, creating significant risk and uncertainty for people and businesses.

A. The decision threatens to substantially enlarge tribal civil jurisdiction over nonmembers in Eastern Oklahoma.

In an area where most residents and business owners are not members of the Nation (or the other Five Civilized Tribes), and where most land is owned in fee by nonmembers, the decision's civil regulatory effects are profound. Tribes lack civil jurisdiction over nonmembers on private fee lands outside of the tribe's Indian country. Federal law defines "Indian country" as including "all land[s] within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Federal law considers "Indian country" status pertinent—or sometimes dispositive—both under federal common law defining whether tribal (and federal) or state powers apply, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (stating "Indian country" "also generally applies to questions of civil jurisdiction"), and by express delegation employing the term, *see Rice v. Rehner*, 463 U.S. 713, 733 (1983) (in 18 U.S.C. § 1161, "Congress intended to delegate a portion of its authority to the tribes"). The determination that a geographic area is an Indian reservation has significant civil jurisdictional effect.

Cf. United States v. Mazurie, 419 U.S. 544, 557 (1975) (Indian tribes retain "attributes of sovereignty over both their members and their territory").

Reservation status, even without specific statutory reference to "Indian country," also can support tribal jurisdictional assertions. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) (prescribing two exceptions to its general rule that tribes lack jurisdiction over nonmember activities on fee lands within reservations). *Montana*'s exceptions extend on-reservation tribal jurisdiction to nonmembers, even on fee lands, "who enter consensual relationships with the tribe or its members" and to those whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* The Nation's claim of "political jurisdiction" will potentially affect civil jurisdiction over the entirety of the former Creek territory. *See* Constitution of the Muscogee (Creek) Nation, art. I, § 2 (1979) ("The political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America . . . ."). Reservation-based civil jurisdiction can extend to taxation, regulation, and court jurisdiction, or can be imposed by express federal delegation over reservation or Indian country lands. The tribal or federal authorities that may be asserted over the former Creek territory by the Nation or the United States are wide-ranging and would affect the lives and businesses of *Amici* and their members.

B. The decision threatens Oklahoma citizens and businesses with tribal taxation.

The decision threatens *Amici* with tribal taxation of nonmembers' fee land property and activities in

certain circumstances.[2] *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (rejecting tribal taxation, but stating Navajo Nation tax on hotel receipts could apply if either *Montana* exception established); *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (tribe entitled to discovery on whether it could impose *ad valorem* property tax under the *Montana* exceptions on federally-granted right-of-way, the equivalent of fee lands, on reservation). The decision might also subject *Amici* to dual state and tribal taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving state severance tax where tribal severance taxes imposed); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982) (tribe may tax on-reservation oil and gas production). For example, Farm Bureau's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery to operate a farm or ranch, and other items are exempt from State sales tax. *See* 68 Okla. St. Ann. § 1358. In a historically low-margin industry, any additional taxes would be onerous. The decision threatens to expose *Amici*'s members to an additional tax burden.

C. The decision threatens Oklahoma citizens and businesses with dispute resolution in tribal courts.

The decision potentially subjects fee lands and non-member activities within the area to tribal adjudicatory jurisdiction. *See Strate v. A-1 Contractors*, 520

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[2] The MCN Tax Code asserts a sales tax, 36 M(C)N Code § 4-101-4-110, a liquor sales tax, 36 M(C)N Code § 7-501, and a cigarette tax, 36 M(C)N Code § 5-108, among other taxes.

U.S. 438, 458 (1997). Determining whether federal law permits tribes to assert jurisdiction over nonmember activities on reservation fee lands requires application of the two fact-based and highly subjective exceptions prescribed by *Montana*, which frequently must first be addressed in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2159 (2016) (per curiam) (finding tribal court jurisdiction existed based on a consensual relationship). The Nation asserts its courts have jurisdiction over nonmembers.[3]

To whatever degree dispute resolution shifts to tribal forums, nonmembers enjoy no right to federal court review of deprivations of due process or other civil rights under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (ICRA). *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *see also Nevada v. Hicks*, 533 U.S. 353, 383-384 (2001) (Souter, J., concurring) ("[T]here is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the Supreme

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[3] The Nation's Judicial Code provides, "Personal jurisdiction shall exist over all defendants, regardless of the Indian or non-Indian status of said defendants, in cases arising from any action or event within the Muscogee (Creek) Nation Indian country" and "[r]esiding[,] conducting business, using roadways or engaging in any other activity within the Muscogee (Creek) Nation Indian Country is deemed consent to Muscogee (Creek) Nation jurisdiction." 27 M(C)N Code § 1-102(B). It defines the "territorial jurisdiction of the Muscogee Courts" to include "all the territory defined in the 1866 Treaty with the United States, including without limitation any real property within the Nation's political jurisdiction as defined in Article I, Section 2 of the 1979 Muscogee (Creek) Constitution." *Id.* (A).

Court precedents jot for not.") (quotation marks and citations omitted). If the decision below is not reversed, *Amici*'s members may be required to exhaust their remedies in tribal courts or to litigate there without right of federal or state court review. The decision threatens burdening *Amici*'s members with risk, delay, and expense in lawsuits in Eastern Oklahoma.

The Nation is preparing to exercise its jurisdiction over millions more individuals and businesses. *See* Jason Salsman, *With Murphy decision looming, LTPD [Lighthorse Tribal Police Department] travels to observe Navajo police*, Mvskoke Media, April 19, 2018, https://mvskokemedia.com/with-murphy-decision-looming-ltpd-travels-to-observe-navajo-police/. Whether the Nation's courts can handle hundreds, if not thousands, more cases from across the former Creek territory remains unknown. Further uncertainty would arise if the decision were extended to all the Five Civilized Tribes.

D. The decision threatens Oklahoma citizens and businesses with tribal regulatory jurisdiction.

The decision threatens to subject nonmember residents and businesses in the former Creek territory to other forms of Nation's regulatory jurisdiction. *See Montana*, 450 U.S. at 566; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (White, J.) (plurality opinion) (tribe may zone nonmember fee land in portion of reservation); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (holding tribe had jurisdiction to enforce tribal employment ordinance on nonmember employer operating a plant on non-Indian land within the reservation based on employment

agreements with the tribe); *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-cv-00489-BLW, 2017 WL 4322393 (Sept. 28, 2017), *appeal docketed*, No. 17-35865 (9th Cir.) (filed Oct. 24, 2017) (tribal court has jurisdiction to enforce environmental fee agreement against nonmember company on fee lands within reservation).

By way of example, the Nation requires any "person desiring to engage in the business of selling goods or items of value within the Muscogee (Creek) Nation territorial jurisdiction" to secure a vendor's sales license, 36 M(C)N Code § 4-107(A), and to pay sales tax, 36 M(C)N Code § 4-103. The Nation issues licenses to sell cigarettes and tobacco "within the Muscogee (Creek) territorial jurisdiction," 36 M(C)N Code § 5-112(A), and requires the payment of Nation-imposed taxes on cigarette sales, 36 M(C)N Code § 5-108. Failure to collect and pay such taxes subjects the vendor to penalties. 36 M(C)N Code § 4-110(A-C). Certainly thousands of vendors must address these additional burdens and concomitant risks. Any such authority would be subject to the fact-dependent application of the two *Montana* exceptions. *See Montana*, 450 U.S. at 566.

In addition, the determination that the Nation has a continuing reservation may trigger claims under the federal common law reserved water rights doctrine, for a large reservation long-ago deemed extinguished, presenting resource uncertainty and possibly hardship for *Amici's* members. *See Winters v. United States*, 207 U.S. 564, 576 (1908); *see also Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (stating Congress "disestablished the Creek and other Oklahoma reservations").

E. Federal authority delegated to tribes may oust state regulation.

Federal delegations of authority to tribes also threaten to shift regulatory jurisdiction to the Nation. As one example, federal law provides tribal regulations may govern the sale of alcohol by restaurants and stores within "Indian country." See *Mazurie*, 419 U.S. at 558 (interpreting 18 U.S.C. § 1161). Consequently, the decision would have the effect of the Omaha Tribe ordinance in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), not just for a small village, but affecting establishments across major portions of Eastern Oklahoma and the State's second largest city, Tulsa. It would prohibit the sale of alcoholic beverages within the Nation's Indian country without a license issued by the Nation's National Council under its federally approved Liquor and Beverage Code. *See* 73 Fed. Reg. 14997-02 (March 28, 2008); 36 M(C)N Code § 7-302(A).

For businesses that now find themselves within the reservation identified by the decision, obtaining federal permits, licenses, or other authorizations may require government-to-government consultation between tribes and the federal government. Under the National Historic Preservation Act § 106 process, consultation with tribes and affected communities is required for any federal approval potentially affecting historic properties on "tribal land," defined, in relevant part, as "all land within the exterior boundaries of any Indian reservation." 54 U.S.C. § 300319. *Amici* do not dispute that government-to-government consultation is appropriate for actions directly affecting tribes and their lands, but the decision threatens to expand that requirement to nonmember activities requiring federal permission across most of Eastern Oklahoma. With the consultation requirement comes

additional expense, delay, and possible imposition of conditions upon any federal approval required for any development project.

While tribes or their members may not prevail in some jurisdictional assertions, the Tenth Circuit's failure to address the profoundly unsettling effect of its decision requires reversal.

II. THE TENTH CIRCUIT INCORRECTLY RELIED SOLELY ON INDICIA APPLICABLE TO SURPLUS LAND ACTS UNDER *SOLEM V. BARTLETT* TO ASSESS CONGRESS' FAR MORE IMPACTFUL ACTIONS DIVESTING THE NATION OF ITS GOVERNMENTAL AUTHORITY *AND* LAND OWNERSHIP IN PREPARATION FOR STATEHOOD.

This Court's decision in *Solem v. Bartlett* recognizes an over-riding principle that Congress can unilaterally reduce the size of a Native American reservation. *Solem* lays out a three-part test to guide the application of that principle in assessing whether Congress "diminished" a Native American reservation when it enacted "*surplus land acts* at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." 465 U.S. at 467 (emphasis added); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) ("The underlying premise is that congressional intent will control."); *DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 444 (1975) ("The congressional intent must be clear . . . ."); *United States v. Celestine*, 215 U.S. 278, 290 (1909) ("[C]ourts may wisely insist that the purpose of Congress be made clear by its legislation but, when that purpose is made clear, the question is at an end.").

Concerning the former Creek territory, Congress enacted a series of statutes to prepare the Creek Nation and the Five Civilized Tribes for the divestiture of tribal lands and unqualified incorporation into the Oklahoma Territory, and ultimately the State of Oklahoma. The series of statutes did not merely allow for the transfer of tribal lands. Congress *both* divested the Creek Nation of title to essentially all of the lands comprising the former Creek territory, transferring the lands to individual Creek members as allotments, *and* stripped the Creek Nation of all vestiges of governmental authority, including the powers to tax, regulate, or resolve disputes throughout the former Creek territory. The history of the Creek Nation and the former Creek territory makes strict application of *Solem* inapposite to determining, as the Tenth Circuit did, which sovereign has authority over a specific plot of land. However, even under a discerning application of *Solem*, there is a compelling showing of disestablishment.

A. The Tenth Circuit ignored the inapplicability of cases applying *Solem*'s test, addressing acts divesting tribes only of land, to the wholesale divestiture of the Nation's tribal authorities and lands.

Solem addressed the effect of the Cheyenne River Act, Act of May 29, 1908, ch. 218, 35 Stat. 460, which "authorized and directed [the Secretary of the Interior] to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota" within certain described areas. 465 U.S. at 472-73. It reviewed cases interpreting "surplus land acts," statutes passed in the late Nineteenth and early Twentieth

centuries "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Id.* at 467. In each case *Solem* analyzed, Congress had created a reservation for the tribe, the lands in all or a portion of the reservation were allotted and the remainder sold or "opened for settlement and entry," but the tribe's government remained in place and retained all governmental powers over remaining tribal lands and allotments. *See DeCoteau*, 420 U.S. at 442 (following allotment, Lake Traverse Band shall "cede, sell, relinquish, and convey . . . all the unallotted land within the reservation"); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962) (after allotments issued, unallotted "surplus lands" patented as homesteads and opened for mineral entry); *Mattz v. Arnett*, 412 U.S. 481, 495 (1973) (Klamath River Reservation lands declared "subject to settlement, entry, and purchase under [federal homestead and mineral entry laws]" after issuance of allotments) (quotation marks and citations omitted).

These and other statutes are appropriately called "surplus land acts" because they affected tribal *lands*, and only tribal lands, leaving tribal government and its authorities whole and intact with respect to the reduced tribal and/or allotted lands. Consequently, the cases turned on Congress' expressions regarding the manner in which Congress "opened lands" or affected "reservation boundaries." The Court has not had the occasion to consider the confluence of actions divesting a tribe of its lands while stripping the tribe of its sovereign powers on any remaining tribal or allotted lands by transferring authority to a state. As the State of Oklahoma develops in its brief, questions exist whether *Solem* should apply at all to Mr. Murphy's challenges to his conviction. *See* Brief for Petitioner 46 (July 23, 2018).

The series of acts applicable to transitioning the Creek lands to readiness for Statehood cannot be shoehorned into a surplus land act pattern. The acts divested the Nation of essentially all tribal lands, stripped the tribal government of all legislative and taxing authority, divested tribal courts of all jurisdiction over all persons, "regardless of race," and transferred the divested authority entirely to the new State of Oklahoma. The Tenth Circuit failed to consider that no similar pattern applied to the surplus land acts cases.

The decision disregards that the 1893-1906 Congresses addressing the Nation unfailingly prescribed the fundamental criteria of non-reservation status, and did not merely address surplus lands after allotment: divestiture of all communal tribal title and authority on all lands within the former Creek territory. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612, 646, (authorizing allotment of Five Tribes' lands, § 15, for the "purpose of the extinguishment of the national or tribal title to any lands within [Indian] Territory," expressly "to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union," § 16); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83-84 ("the United States courts . . . shall have original and exclusive jurisdiction . . . [over] all civil . . . and all criminal causes [in the Indian Territory] . . . irrespective of race," and any "acts, ordinances, and resolutions of the Council of [any] of the Five Tribes" shall be subject to disapproval by the President); Curtis Act, ch. 517, 30 Stat. 495, 504-505 (June 28, 1898) (prohibiting enforcement of Five Tribes laws in United States courts in the Indian Territory, § 26, abolishing all tribal courts in the Indian Territory, and transferring all causes pending in any tribal court "to

the United States court in said Territory," § 28); Act of March 1, 1901, ch. 676, 31 Stat. 861 (1901 Act) (approving the First Creek Agreement, providing "all lands of [the Creek Nation] shall be allotted among the citizens of the tribe," § 8; providing for townsites, § 10; providing Creek national council acts or ordinances could pertain only to tribal or allotted lands or tribal members—and only if approved by the President, § 42; and disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress," § 47); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 (1902 Act) (approving the Second Creek Agreement, replacing Creek law of descent and distribution with Arkansas law, § 6; providing for the Dawes Commission, not the Creek Nation, to determine roles establishing membership and entitlement to allotments, § 9; and providing all residual funds of the Creek Nation not needed for allotment purposes be paid out ratably to its members, § 14); Five Tribes Act, ch. 1876, 34 Stat. 137 (April 26, 1906) (requiring Secretary to assume control of tribal revenues, schools, § 10; limiting terms of councils and requiring President's approval of all ordinances, § 28). Finally, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.

The series of statutes relating to the Creek Nation and the creation of the State of Oklahoma divested the Nation of all recognized tribal governmental powers, including providing exclusively for Territorial and State law and non-tribal courts, and transferring almost all lands from tribal to allotted ownership and, ultimately, to nonmembers. Those acts both 1) unambiguously contemplated the termination of any prior reservation status of the subject lands, and 2) provide powerful contemporaneous evidence Congress intended

to terminate. *See Rosebud Sioux Tribe*, 430 U.S. at 604-606. The decision's unexamined insistence on facts from settings far different from Eastern Oklahoma history led it to ignore compelling expressions of Congressional intent. Congress allotted substantially all Creek lands to members, contemplating the widespread transfers to nonmembers that ensued, with the intent that all would reside—and do business—in Oklahoma, a non-reservation environment.

Instead, the decision emphasizes immaterial factors: whether the Creek Nation's tribal existence was terminated, Pet. App. 96a-98a; whether the Creek Nation retained jurisdiction over tribal or trust or restricted allotted lands, *id.* 105a-107a; and whether the United States continued to discharge trust responsibilities over tribal or allotted trust or restricted lands, *id.* 102a-103a. But, those facts existed in every case in which this Court found disestablishment or diminishment. *See, e.g.*, *Rosebud Sioux*, 430 U.S. at 604. In ignoring the plain Congressional intent and history unique to the Nation, the Tenth Circuit misapplied *Solem*.

B. Even if *Solem* provides the correct analysis, the Tenth Circuit erred in its analysis at each of the *Solem* steps.

1. Insisting on surplus land act "hallmarks" of disestablishment, the Tenth Circuit misapplied *Solem* step 1.

The Tenth Circuit never addressed whether the series of statutes effecting the wholesale transfer of tribal governmental authority to a State, in tandem with the divestiture of nearly all tribal lands, supplied the requisite unambiguous intention to terminate the

Creek reservation. Congress frequently expressed intent on a single reservation in multiple allotment era statutes. The statutes in this case evolved in an era when ongoing and evolving policies worked to the end that "the Indians be gradually assimilated to and merged into the body of citizens," Francis Paul Prucha, *The Great Father*, Vol. II 692 (1984). Local public pressures, the pace of tribal negotiations, and lengthy legal developments frequently figured in Congress' patchwork approach to addressing specific tribal governments and reservations. Such incremental federal action is reflected in the history of the Creek Nation and the Five Tribes. As summarized by Prucha, perhaps the leading historian of federal Indian policy, the Five Civilized Tribes, "who had advanced the furthest along the white man's road . . . seemed [to white reformers] most apt for final absorption into American society as individualized, landholding citizens." *Id.* at 736. Congress extended federal authority and reduced tribal powers during the 1890s and early twentieth century toward "dissolution of the tribal governments." *Id.* at 748. However, the Five Tribes resisted over many years. *Id.* at 750-756. Finally, the Tribes "made a valiant attempt to preserve their identity within the federal system by promoting separate statehood for the Indian Territory," advocating a state of Sequoya, but that proposal was "blocked in Congress," resulting in the Oklahoma Enabling Act of 1906. *Id.* at 756. As a result, "The Indians of Oklahoma were an anomaly in Indian-white relations. . . . There are no reservations in Oklahoma, however, and the reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." *Id.* at 757. The Tenth Circuit, in seeking "hallmark" indicia of disestablishment in each of the several statutes, examined

seriatim, *see* Pet. App. 75a-96a, misunderstood this history and the Court's guidance in relying upon "[n]o hallmarks of disestablishment or diminishment," *id.* 96a.

This Court, however, has recognized the unambiguous intent expressed in multiple statutes affecting a specific reservation over the period of deliberations and negotiations. In *Rosebud Sioux Tribe v. Kneip*, the Rosebud Sioux Tribe sued to "obtain a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been diminished by three subsequent Acts of Congress passed in 1904, 1907, and 1910 . . . ." 430 U.S. at 585. In its conclusion, the Court left no doubt it analyzed all three acts and their interplay to ascertain congressional intent: "We conclude that the Acts of 1904, 1907, and 1910 did clearly evidence congressional intent to diminish the boundaries of the [reservation]." *Id.* at 587. Indeed, "[b]ecause of the history of the 1901 Agreement, the 1904 Act cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the [reservation]." *Id.* at 592; *see also Hagen v. Utah*, 510 U.S. 399, 403-406, 415 (1994) (legislation about the Uintah Reservation enacted in 1902, 1904, and 1905 "must . . . be read together").

It did not create ambiguity that Congress' intent concerning the Creek Nation (and the Five Tribes) was expressed in statutes all having the same purpose: terminating tribal authority and vesting all authorities in Territorial government and, ultimately, the new State. As delineated at Point II.A., *supra*, though certain of Congress's actions directly addressed the Creek Nation, others addressed the Five Tribe, and the Oklahoma Enabling Act completed incorporation

of the former Indian Territory into the State, all seek the same end articulated in 1893: "the extinguishment of the national or tribal title to any lands. . . [and] ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union." Act of March 3, 1893, §§ 15-16.

The decision mechanically applied the *Solem* framework, erring in its application by concluding Congressional intent to disestablish can *only* be found where terms it deemed required—and specific statutory language—is contained in a single statute. *See* Pet. App. 107a (stating the analyzed statutes "lack any of the 'hallmarks of diminishment'" (quoting *Parker*, 136 S. Ct. at 1079)). Although it denied doing so, the decision sought to find "magic words" in a single Congressional act, and held Congress had failed to meet the decision's created test for reservation disestablishment. *See* Pet. App. 101a. *Solem* imposed no such textual straight-jacket, and this Court has never mandated such a narrow and rigid test for determining Congressional intent. Statutory text "consists of words living 'a communal existence,' . . . the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941)). "Under settled principles of statutory construction," statutes that are "*in pari materia*—that is, pertain to the same subject— . . . should . . . be construed 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845)); *see also Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 390 (1976) (reading statutes relating to

jurisdiction over tribes and tribal members by applying the *in pari materia* doctrine).

The Tenth Circuit's decision discarded its earlier opinion in *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011), a highly relevant precedent. *See* Pet. App. 61a. *Irby*, on a substantially similar historical record, found disestablishment when the relevant statutes "did not directly open the reservation to non-Indian settlement." 597 F.3d at 1123. *Irby* observed that Congress "disestablished the Creek and other Oklahoma reservations." *Irby*, 597 F.3d at 1124. By failing to read and construe together the long line of Congressional acts to terminate the Creek government and end any tribal authority over people and lands in the new State, the decision ignored this Court's longstanding teachings as well as its own precedent.

Enactments affecting the Creek Nation, and the Five Civilized Tribes, are largely unique within Indian history, as they *both* divested tribal government of tribal lands *and* transferred governmental authorities from tribal hands to a newly created State. *Amici*'s members and other nonmembers who moved into the former Creek territory to occupy the increasing percentages of private land would have understood that federal law made sure law, taxation, and dispute resolution all were exactly as they would find them elsewhere in Oklahoma. The combined effects of divestitures of tribal power *and* lands could not fall farther from the rationales of leading surplus land act cases, "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government . . . regarded as beneficial to the development of its wards."

Seymour, 368 U.S. at 356; *accord*, *Mattz*, 412 U.S. at 497.

2. Contemporaneous understandings the Creek reservation was terminated led to *Amici*'s members' living, working, and doing business in the former Creek territory.

Even if the legislative language of the relevant acts were ambiguous, despite their consistent goals and expressions, *Solem* step two directs a review of the "events surrounding the passage of a surplus lands act" to determine whether they "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation . . . ." 465 U.S. at 471. The historical record establishes that the United States, the Nation, and knowledgeable participants uniformly believed that, on Statehood, the former Creek (and Five Tribes) territory no longer existed as a reservation, and the Nation, its members, and nonmembers living and doing business did so in a non-reservation area subject to Oklahoma law, taxation, and courts.

Before Statehood, Creek members could lease tracts from the Nation of the commonly-owned former Creek territory for an annual rental fee, and then lease the land out, at a profit, to nonmember ranchers. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 15 (Princeton Univ. Press, 4th ed. 1991). After Congress divested the Nation of most of its land ownership, however, and vested the new State of Oklahoma with jurisdiction over land not allotted to individual members or reserved to the Nation, nonmembers could purchase or lease ranching land from any allottee landowner. The Nation received no benefit from nonmember ranching on the former

territory. *See Groom v. Wright*, 121 P. 215, 219 (Okla. 1912) (holding Congress permitted allottees to lease their land for farming or grazing purposes, "to thus encourage the development of the country, and at the same time to yield a return to the allottee. Such has been the manifest purpose of the federal government in bringing about a change in both the land tenures and forms of government among the members of the Five Civilized Tribes").

Oil development in the former Creek territory began in 1901, but was limited until the 1902 Act, giving the United States control over mineral development. *See* Debo, *And Still*, 86-87. At Statehood, however, authority over oil and gas development transferred to Oklahoma, except on trust lands requiring a federally approved lease. The Oklahoma Corporation Commission was established in 1907, Okla. Const. Art. IX, to regulate businesses essential to the public welfare, including transportation, transmission, and communication companies. In 1915, the Oklahoma Legislature extended the Corporation Commission's jurisdiction to include authority over oil and gas exploration and extraction. 52 Okla. St. Ann. § 243. Shortly after Statehood, a single state entity exercised regulatory jurisdiction over companies involved in the same business as OKOGA's members, and some of the State Chamber's members, today. Any federal or tribal authority was applied only to tribal lands. Had contemporaneous Oklahomans, the Nation, or the United States understood the Nation to retain regulatory jurisdiction over all of its historical territory, the state-wide assertion of that authority would not be expected.

In addition, the courts of the new state of Oklahoma exercised jurisdiction over disputes arising from oil

and gas leases on land within the former Creek territory. *See, e.g., Eldred v. Okmulgee Loan & Trust Co.*, 98 P. 929 (Okla. 1908). Such exercise of jurisdiction would have contravened any contemporary understanding that the Nation retained jurisdiction over the surface and minerals of its former territory. *See* Okla. Enabling Act, 34 Stat. 267, § 8 (granting the State authority over all minerals, gas, and oil under lands granted to the State).

Before the passage of the Five Tribes Act, the Nation, like the other Five Civilized Tribes, could tax development within its territory, including grazing, mining, and businesses. The Five Tribes Act, however, abolished the right of the Nation to collect taxes from nonmembers. 34 Stat. 137, §§ 10, 16; *see also* Debo, *And Still*, 65-66, 81-82. The Oklahoma Constitution granted the State the authority to tax all property except "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws." Okla. Const. Art. X, § 6; *see* Okla. Enabling Act, 34 Stat. 267, § 25, 2nd (exempting from State taxation only lands held by the United States or allotments subject to restriction). With the Act of May 27, 1908, §§ 6, 8, 35 Stat. 312, the United States authorized early lifting of restrictions on the conveyance of allotments, expanding the lands subject to Oklahoma's taxation authority. *See Fink v. Bd. of Comm'rs of Muskogee Cty.*, 248 U.S. 399, 404 (1919); *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913) ("As soon as the title, both legal and equitable, to the land in question became vested in [the allottee], it was subject to taxation by the state and county authorities . . . .").

When Oklahoma became a state, it was widely understood that Oklahoma, and not tribes or the federal government, would exercise regulatory and adjudicatory jurisdiction over nonmembers and all land not otherwise held by the United States, expressly granted to a tribe, or held in allotment subject to restriction. The decision below erred in ignoring the contemporaneous understanding of the effects on tribal jurisdiction at Oklahoma's Statehood. First, the decision's conclusion that the pre-1901 legislative history did "little to advance the analysis because the State does not dispute that the reservation was intact in 1900," Pet. App. 109a (quotation marks, citation omitted), ignores the intent to disestablish the Creek Nation reservation expressed in the pre-1901 Acts remained and was executed by the 1901 and 1902 Acts and confirmed in the Five Tribes Act and other 1906 legislation, including the Enabling Act. Congress' pre-1901 enactments, and their legislative histories, declared the policy of the United States toward the Five Civilized Tribes, which, for the Creek, led to the Agreements confirmed by enactment of the 1901 and 1902 Acts. Consequently, the pre- and post-1901 evidence demonstrate a continuity of purpose that the decision minimized or ignored.

Second, and contrary to the decision's limited review, the legislative histories of the acts reflect Congress' goal was to transfer jurisdiction from the Creek Nation to the State, abolish communal landholdings and allow transfers of allotments, and subject all such lands and residents to State law and courts, a goal entirely inconsistent with continued reservation status. *See, e.g.*, *United States v. Hayes*, 20 F.2d 873, 879-880 (8th Cir. 1927) (reviewing, as relevant to the Creek government, the "course of legislation, from its beginning to its end," and concluding its "main purpose was

to do away with the tribal governments"); H.R. Rep. No. 57-2495, 1 (June 14, 1902) (Committee on Indian Affairs report discussing the 1902 Act, stating it "will permit the Government to close up the affairs of the Creek tribe of Indians, make all of their allotments, and finish the work of the Dawes Commission in said nation . . . ."). The decision did not consider thoroughly the legislative histories demonstrating Congress intended to disestablish the Creek Nation "reservation" and substitute State criminal, civil, taxing, and adjudicatory jurisdiction and individual land ownership. The contemporary understanding of the Nation's Agreements confirmed by the 1901 and 1902 Acts was the Creek Nation would lose all jurisdiction over any of its former territory upon completion of allotment (except that expressly retained for the tribe by Congress).

3. Subsequent treatment of the former Creek territory points to disestablishment, satisfying *Solem* step 3.

The Tenth Circuit relied on actions pertinent to remaining trust parcels or convenient geographic references to the "Creek Nation" to term later treatment "inconclusive," ignoring the import of actions that reflect on the far more pertinent question whether tribal governmental authority was deemed to apply across the former Creek territory. *Amici's* members exemplify the widely held understandings that it would not. They have lived, invested, entered commercial arrangements, and structured their conduct in the belief they did so in an area where Oklahoma law, taxation, and dispute resolution unqualifiedly applied. The decision took too superficial a look at the *Solem* step three evidence and inadequately considered later treatment of the former Creek territory by Congress.

As early as 1908, Congress lifted restrictions on alienation of Creek allotted lands, allowing much earlier alienability and application of state law to allotted lands. *See* 35 Stat 312, §§ 6, 8. In 1918, Congress subjected lands of the Five Tribes to "the laws of the State of Oklahoma providing for the partition of real estate," removing from partitioned lands "all restrictions of any character." Act of June 14, 1918, ch. 101, § 2, 40 Stat. 606, compiled at 25 U.S.C. § 355. Reflecting their non-reservation character, in 1926, allotted lands of the Five Civilized Tribes were subjected to Oklahoma State court jurisdiction, including State statutes of limitations. *See* Act of April 10, 1926, § 2, 44 Stat. 239. Further recognizing there were no reservations in Oklahoma, Congress excluded the Creek, and other Oklahoma Tribes, from the application of the landmark Indian Reorganization Act of 1934, *see* Act of June 18, 1934, ch. 576, § 13, 48 Stat. 986, compiled at 25 U.S.C. § 5118, later restoring its application to "any recognized tribe or band of Indians residing in the State of Oklahoma." *See* Act of June 26, 1936, c. 831, § 3, 49 Stat. 1967, compiled at 25 U.S.C. § 5203; *see also, e.g.*, 25 U.S.C. § 1603(16)(B)(i) (defining the term "reservation," for the Indian Health Care Act, to include "former reservations in Oklahoma").[4]

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[4] The decision incorrectly relies on scattered references to the "Creek Nation," which, in context, is plainly a mere "convenient geographical description" to define the geographic area within which prescribed transfers or federal services for the Creek would apply. *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998); *United States v. Okla. Gas & Elec. Co.*, 318 U.S. 206, 216–17 (1943) (concluding the term "reservation" "was used in a geographical and not a legal sense").

The State's unquestioned exertion of jurisdiction over the predominantly non-Indian, nonmember population residing on former Creek Nation lands since 1901 and further, since 1906, strongly supports a conclusion of reservation disestablishment. *See Rosebud Sioux*, 430 U.S. at 604-6; *see also Creek Nation v. United States*, 24 Ind. Cl. Comm. 238, 250 (1970) (on passing acts to dissolve the Creek Nation, "[t]he United States assumed the task of terminating the Nation's mode of life include its manner of holding its lands"). Significantly, the court of appeals failed to consider evidence that the duty of maintaining order and enforcing laws on non-trust lands has resided almost exclusively in the hands of county and State officials, not tribal government. *See Hagen*, 510 U.S. at 421. The expectations of Oklahoma's residents and businesses, including many of *Amici*'s members, would be turned upside down if the decision below is not reversed.

Demographic changes further reinforce the understanding Congress terminated any reservation status of the former Creek Territory. The population of the Tulsa metropolitan area as of the 2010 census was 937,478. *See* U.S. Census Bureau, Quick Facts, Tulsa County, Oklahoma *available at* https://www.census.gov/quickfacts/fact/table/tulsacountyoklahoma/PST045217 (last visited July 22, 2018). The Nation reports 16,257 of its members live in Tulsa County as of 2016. *See* Muscogee (Creek) Nation, Citizenship Board, Facts & Stats, *available at* http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/ (last visited July 23, 2018). Less than one percent of Tulsa County's residents are members of the Nation, and the metropolitan area has developed for more than a century under state authority.

Over a century of unqualified reliance by predominately nonmember residents and businesses in the former Creek territory reflect the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The equitable doctrines that led this Court to conclude in *City of Sherrill* that "long delay . . . and developments in the [area] spanning several generations, . . . render inequitable [a] piecemeal shift in governance," *id.* at 221, appropriately figure in a *Solem* step three analysis on the record presented here. The court of appeals failed to address that extended reliance.

The decision incorrectly dismissed the State's evidence on Congressional intent and later history. As the Court confirmed in *Nebraska v. Parker*, evidence of congressional intent and later treatment figure significantly in the *Solem* analysis, and, while modern treatment of an area alone cannot show disestablishment, finding disestablishment is not solely dependent on clear statutory language. 136 S. Ct. at 1081-82. The Tenth Circuit failed to distinguish between the evidence of later understandings in *Parker*, addressing another prototypical surplus land act, and the unequivocal indications of all participants that the Creek Nation had no remaining reservation.

For decades, ranchers, farmers, oil and gas developers, and companies of all stripes doing business in the former Creek territory have been subject to State jurisdiction for taxation, environmental, and other regulation, and their disputes resolved in State courts. The consequences for the great majority of the population residing within the former Creek territory are far too significant to ignore that long reliance. The

decision below erred in giving too short a shrift to the contemporary and modern understandings of whether the Nation has a reservation that extends to the boundaries of its 1866 territories. The evidence that should be considered at *Solem* steps two and three weighs heavily in favor of disestablishment and, with the clear Congressional language analyzed at *Solem* step one, leaves no conclusion but that the Tenth Circuit erred in reinstating a reservation for the Nation.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF FORMER UNITED STATES ATTORNEYS TROY A. EID, BARRY R. GRISSOM, THOMAS B. HEFFELFINGER, DAVID IGLESIAS, BRENDAN V. JOHNSON, WENDY J. OLSON, TIMOTHY Q. PURDON AND DANNY C. WILLIAMS, SR. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici Curiae are all former United States Attorneys, appointed by Republican and Democratic Presidents and confirmed by the United States Senate, with extensive direct experience prosecuting crimes arising in Indian country and well-versed in the jurisdictional interplay among Federal, State and Tribal authorities responsible for public safety and the administration of justice.

Amici have actively participated in the legislative process by which Congress has enhanced coordination and cooperation among Federal, State and Tribal law enforcement jurisdictions by enacting statutes such as the Violence Against Women Act Amendments of 2013, PL-113-4 ("VAWA 13"), and the Tribal Law and Order Act of 2010, Pub.L. 111–211, H.R. 725, 124 Stat. 2258 ("TLOA"). These and other laws attest to Congress' demonstrated recent ability to adjust the appropriate scope of Federal jurisdiction in Indian country when the interests of justice require it, and with due respect and consideration for the public safety needs of States and Tribes alike.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and have consented.

SUMMARY OF THE ARGUMENT

Given the obligations solemnly agreed to by the United States in the Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, it is Congress' exclusive role to assess and, as may be needed, adjust the jurisdictional division of authority among Federal, State and Tribal law enforcement and prosecutorial authorities on the Muscogee (Creek) Reservation ("Reservation"). Under our Constitution, Congress is the proper forum in which representatives of all three sovereigns can deliberate matters of public safety and the administration of justice on the Reservation, including the appropriate scope of Federal, State and Tribal criminal jurisdiction.

The United States asked this Court to accept review of this case because "[t]he federal government lacks sufficient investigatory and prosecutorial resources in the area to handle that volume of cases; the FBI currently has the equivalent of seven agents for all of eastern Oklahoma." United States Brief in Support of Certiorari at 22. The United States has sensibly not pressed this argument on the merits. It is properly addressed to Congress, not this Court, because Article I, Section 8 of the United States Constitution expressly delegates to Congress exclusive authority to regulate commerce with Indian tribes. Laws enacted by Congress beginning in the 1790s regulating sales, leases and other conveyances of tribal land and trade and interactions with Indian tribes remain substantially in effect. *See* 25 U.S.C. §§ 177 and 261-264. Many treaties between the United States and Indian tribes – which, like laws enacted by Congress, are the law of the land under the Supremacy Clause of the Constitution – and any abrogation of

such treaties are the exclusive province of Congress. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); and *United States v. Dion*, 476 U.S. 734 (1986). Questions as to how law enforcement and prosecution resources can be most effectively allocated among Federal, State and Tribal officials and institutions do not fall within the province of judges; they are rather the essence of lawmaking. Congress has demonstrated its ability to address the inter-relationship of Federal, State and Tribal jurisdiction in Indian country, including in the recent past by enacting VAWA '13 and TLOA, and through statutes adjusting the scope of jurisdiction on particular reservations. Congress' time-tested plenary power over Indian affairs, including within the treaty-making context, should be respected here.

ARGUMENT

I. The authority to abrogate treaties is exclusively vested in Congress.

"The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). That "first and governing principle" is the alpha and the omega of analysis in this case. "[T]hough petitioners wish that Congress would have spoken differently . . . we cannot remake history." *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (quotation omitted).

Whether federal and tribal jurisdiction is the most effective approach to governing this section of Oklahoma is fundamentally irrelevant. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots

within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.*

The act of abrogating a treaty or disestablishing a reservation is of the utmost seriousness, requiring "an act of Congress, passed in the exercise of its constitutional authority. . . clear and explicit." *United States v. Dion*, 476 U.S. 734, 738 (1986), quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

"The whole intercourse between the United States and [the Tribe], is, by our constitution and laws, vested in the government of the United States." *Worcester v. The State of Georgia*, 31 U.S. 515, 561 (1831). Any state law or action to the contrary "is consequently void." *Id.* "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). "This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 148 n.40 (1996).

Judicial determinations as to the actual or perceived resource needs of law enforcement officers and prosecutors on Indian reservations are not an appropriate ground for abandoning these well-established principles. Many other important legal principles have "controversial public safety implications," including all constitutional and other legal provisions "that impose restrictions on law enforcement and on the prosecution of crimes." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010). The exclusionary rule, for example "generates substantial social costs which sometimes include setting the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quotation omitted).

Likewise, "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U. S. at 739. "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." *Worcester*, 31 U.S. at 556-57. These are fundamental principles rooted in the separation of powers and the authority of Indian tribes as sovereign states. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.").

Petitioners' arguments are properly addressed to Congress. The give-and-take of the legislative process provides the proper forum in which the interests of Federal, State and Tribal officials can be deliberated and addressed with due consideration for the interests of all concerned. The Constitution demands no less, and does so to address a fundamental flaw in the text of the Articles of Confederation, which read: "The United States in Congress assembled shall also have the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[2] This provision in the Articles gave authority to regulate trade with Indians to both the Continental Congress and to the States within their borders.

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[2] Articles of Confederation, Art. IX, 1 U.S.C. Organic Laws.

In the Federalist No. 42, James Madison described the purpose of the Indian Commerce Clause:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

II. Through its exercise of legislative authority, Congress has adjusted the scope of criminal jurisdiction in Indian country, both nationally and locally.

Congress has demonstrated its ability to address the proper division of responsibility and authority among Federal, State and Tribal officials through the legislative process, including with respect to the scope

of criminal jurisdiction and resources among the three sovereigns. To give just two examples, Congress enacted TLOA "to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country; . . . (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women." TLOA § 202.

TLOA provides that Tribes may impose sentences of more than one year (but not more than three years) if they "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction." *Id.* at § 234(c)(2). Tribes must also provide a judge who is law trained and a licensed attorney, publish their criminal codes, and maintain a record of the proceeding. *Id.* at § 234(c)(3)-(5). Other key TLOA provisions include training requirements so that Tribal law enforcement may be Federally deputized to enforce Federal criminal law within Indian country.

VAWA '13 recognizes Tribes' inherent jurisdiction over non-Indians in certain domestic violence cases. 25 U.S.C. § 1304; 25 U.S.C. § 1304 note 2. Under this legislation, Tribes electing to do so may assume jurisdiction over non-Indians on tribal lands to prosecute several specific domestic violence offenses under tribal law. 25 U.S.C. § 1304. VAWA '13 partially repeals this Court's decision in *Oliphant v. Suquamish*

Tribe of Indians, 435 U.S. 191 (1978), which held that Indian tribes lack criminal jurisdiction over non-Indians. As with TLOA, VAWA '13 requires participating tribes to respect all constitutional rights of the defendants including the provisions of counsel for indigent defendants and to have a judge licensed in the practice of law. *Id.* at § 1304(d); 25 U.S.C. § 1302(c).

VAWA '13 is shaping the scope of concurrent Federal-Tribal jurisdiction in Oklahoma and other states. As of last March, 19 Federally recognized tribes have prosecuted non-Indian criminal defendants pursuant to VAWA '13, resulting in 74 convictions and five acquittals, with 24 cases pending.[3] The populations of the reservations of the participating tribes range from almost entirely Native American to fewer than 23 percent and include the Tribe and other tribal governments in Oklahoma. *Id.* at 18.

These are just the most recent in a long string of legislative enactments dealing with criminal jurisdiction in Indian country. *See for example*, the General Crimes Act of 1817, 18 U.S.C. § 1152; the Major Crimes Act (1883), 18 U.S.C. § 1153, Public Law 83-280 (1953, amended 1968), 18 U.S.C. § 1162; 25 U.S.C. § 1360, and the Indian Civil Rights Act (1968), 25 U.S.C. § 1301.

Congress has also demonstrated its ability to address the scope of Federal, State and Tribal criminal jurisdictional issues by adjusting specific reservation boundaries. For example, PL-98-290, 98 Stat. 201 (May 21, 1984), demarcated the boundaries of the

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[3] National Congress of American Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report (March 20, 2018) at 7, available at *http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf*.

highly allotted Southern Ute Indian Tribe's reservation in southwestern Colorado and clarified the allocation of criminal jurisdiction within those boundaries. Notably the largest community on that reservation, the Town of Ignacio, was specifically placed under state criminal and civil jurisdiction at the request of the tribe and with its consent, PL-98-290 § 5.

More recently, PL 113-232, the Blackfoot River Land Exchange Act of 2014 was enacted "to resolve the land ownership and land use disputes resulting from realignment of the River by the [U.S. Army] Corps of Engineers during calendar year 1964 pursuant to the project described in subsection (a)(4)(A); and (2) to achieve a final and fair solution to resolve those disputes." PL 113-232, § 2(b).

Congress currently is considering "[a]n Act to confirm undocumented Federal rights-of-way or easements on the Gila River Indian Reservation, clarify the northern boundary of the Gila River Indian Community's Reservation, [and] . . . take certain land located in Maricopa County and Pinal County, Arizona, into trust for the benefit of the Gila River Indian Community." H.R. 4032. This bill has passed the House and is currently before the Senate. The Senate is also considering, S. 2788, "A bill to repeal the Act entitled "An Act to confer jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation," currently in committee.

These examples do not include recent acts of Congress taking land into trust on behalf of Tribes, recognizing or restoring Tribes, or approving water rights

settlements – all of which deal with specific issues of Indian reservation boundaries and property rights.[4]

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[4] For example in 2018 the Senate Committee on Indian Affairs held at least six hearings on land legislation specific to individual tribes, *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; ***Legislative Hearing to receive testimony on S. 2154, S. 3060 and S. 3168*** (July 18, 2018)(regarding S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act and S. 3168, A bill to amend the Omnibus Public Land Management Act of 2009 to make Reclamation Water Settlements Fund permanent); ***Legislative Hearing to receive testimony on S. 2599*** (July 11, 2018)(regarding S. 2599, the Leech Lake Band of Ojibwe Reservation Restoration Act); ***Business Meeting to consider H.R. 597, the Lytton Rancheria Homelands Act of 2017*** (July 11, 2018); ***Business Meeting to consider H.R. 1491, the Santa Ynez Band of Chumash Indians Land Affirmation Act of 2017*** (June 13, 2018); ***Legislative Hearing to receive testimony on the following bills: H.R. 597 & H.R. 1491*** (April 25, 2018)(regarding H.R. 597, A bill to take lands in Sonoma County, California, into trust as part of the reservation of the Lytton Rancheria of California, and for other purposes; and H.R. 1491, A bill to reaffirm the action of the Secretary of the Interior to take land into trust for the benefit of the Santa Ynez Band of Chumash Mission Indians, and for other purposes); ***Business Meeting to Consider S. 995 & S. 1953*** (Feb. 14, 2018)(regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017). During the same period, the Committee also held hearings on issues and legislation related to criminal justice in Indian country. *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; *Oversight Hearing on "Justice for Native Youth: The GAO Report on 'Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency' "*

It is not necessary to construe the historic statutes relied on by Petitioners in "a backhanded way," *Menominee Tribe*, 391 U.S. at 391, when Congress continuously demonstrates its ability to use the legislative process to address the balance of powers among the three sovereigns.[5]

(Sep. 26, 2018); *Oversight Hearing on "Protecting the Next Generation: Safety and Security at Bureau of Indian Education Schools"* (May 16, 2018); *Oversight Hearing on "Opioids in Indian Country: Beyond the Crisis to Healing the Community" (Mar. 14, 2018); A Listening Session on "Addressing Gaps in Protections and Services for Native Women"* (Feb. 12, 2018); and *Business Meeting to Consider S. 995 & S. 1953* (Feb. 14, 2018)(regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017).

[5] Indeed, Amici have variously testified individually before Congress on these topics numerous times as Congress carefully considers the experiences of the stakeholders, including law enforcement officers. *See e.g., Examining Federal Declinations to Prosecute Crimes in Indian Country: S. Hrg. 110-683 Before the S. Comm. on Indian Affairs*, 110th Cong. 31 (2008)(statement of Thomas B. Heffelfinger); *Hearing on S. 1763, Stand Against Violence and Empower Native Women Act; S. 872, A Bill to Amend the Omnibus Indian Advancement Act to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Considered to be Held in Trust and to Provide for the Conduct of Certain Activities on The Land*; S. 1192, *Alaska Safe Families and Villages Act*, S. Hrg. 112-489, 112th Cong. 22 (2011) (statement of Thomas B. Heffelfinger); *Law Enforcement in Indian Country, Hearing Before the S. Comm. On Indian Affairs*, S. Hrg. 110-136, 110th Cong. 62 (2007) (statement of Thomas B. Heffelfinger); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 31-32 (Sept. 22, 2011) (statement of Brendan V. Johnson, U.S. Attorney, District of South Dakota); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice*

III. Congress is best situated to determine the public safety needs and requirements of the Reservation with due consideration of Federal, State and Tribal concerns.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), but only within the limited options presented by the case before the Court. This Court faces a binary choice: Either a rural road in Henryetta, Oklahoma is part of the Creek Reservation or it is not, and thus either the State court had criminal jurisdiction or it did not.

Congress has no such limitations. It is not constrained to debate the meaning and purpose of Allotment Era statutes; instead, Congress has the authority to hold hearings on the present capacity of the Tribe to provide criminal justice services, and to take testimony from both State and Tribal officials and others regarding how they would prefer to distribute responsibility and jurisdiction. Congress is the only branch of government that has that has the tools at its disposal to reach a solution regarding the Creek

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Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs, 112th Cong. (Sept. 22, 2011) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014)(testimony of Timothy Q. Purdon, U.S. Attorney, District of North Dakota); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission).

Reservation that is respectful and practical.

More specifically, Congress has numerous options when faced with issues such as the appropriate scope of Federal, State and Tribal criminal jurisdiction in Oklahoma. For instance, Congress might leave the Reservation fully or partially intact and provide additional funding and support for tribal and federal law enforcement. The Federal government already funds several important programs to improve criminal justice in Indian country, and these or similar programs could be expanded to address the concerns raised by the State of Oklahoma and others.

In the years 2014 and 2015, BIA funding for law enforcement programs was $213.0 million and $212.0 million, with 37% spent on BIA direct service programs and the remainder on tribally run programs.[6] BIA funding for detention and corrections programs was $105.4 million and $108.9 million and for tribal courts was $29.3 million and $29.4 million. *Id.* Other programs are run out the Department of Justice, including the Tribal Courts Assistance Program, which provides grants to support tribal justice systems, authorized by 25 USC 3689(a) (Public Law 106-559) (25 USC 3689(a)) and the Tribal Civil and Criminal Legal Assistance Program (TCCLA), authorized by 25 U.S.C. 3651, *et seq.* (Public Law 106-559). Congress can provide additional funding to the Creek Tribe to help it take on its increased responsibilities. And, of

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[6] Bureau of Indian Affairs – Office of Justice Services, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country (Sept. 17, 2017) at 2, available at https://www.bia.gov/sites/bia.gov/files/assets/bia/oja/ojs/pdf/Report_Final-Cleared.pdf.

course, it can expand the Federal law enforcement resources available in this part of Oklahoma.

Second, Congress could pass specific legislation regarding the division of responsibilities and criminal jurisdiction between the Tribal, State and federal governments. Just as PL-98-290 carved out the largest town on the Southern Ute Reservation and placed it under state criminal jurisdiction, Congress could place the city of Tulsa and surrounding communities under State criminal jurisdiction or provide for concurrent jurisdiction. Congress might alternatively provide for concurrent state and tribal jurisdiction over the state of Oklahoma just as it has for Alaska, California, Minnesota, Nebraska, Oregon and Washington in PL-83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360).

Third, Congress could redraw the boundaries of the Creek Reservation to include areas that remain heavily Creek, while excluding areas that have a predominantly non-Indian character. Because Congress's powers extend beyond simply drawing boundaries, such legislation could include provisions that would recognize, support and expand the sovereignty of the Tribe on its remaining reservation, such as assisting with the reacquisition of Tribal trust lands, and strengthening Tribal civil jurisdiction and taxing authority.

Another issue which has not been emphasized by litigants or *amici*, but which might lend itself to deliberation in the Congressional law-making process, is the application of 18 U.S.C. § 3598, which provides that "no person subject to the criminal jurisdiction of

an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction." Under this Federal statute, capital punishment may only be imposed for crimes arising on the Reservation committed by Indians if the Tribe consents.

These examples are illustrative only; amici do not suggest that they are necessary or desirable. Whichever combination of scenarios that might arise in response to the decision by the court below, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470.

As in the interstate commerce context, Congress has the final say over reservation boundaries and it can change the rule challenged here based on its considered review of the issues and priorities involved. The Congressional forum is best suited to ensure participation by the State and the Tribe in that dialogue. Congress alone has the constitutional expertise and authority to address changes to the reservation policies that have persisted for several hundred years.

* * *

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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In The Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* HISTORIANS, LEGAL SCHOLARS, AND CHEROKEE NATION IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae listed in the Appendix are historians and legal scholars, many of whom have expertise in Oklahoma history and who teach and write about federal Indian policy and tribes. The Cherokee Nation, one of the "Five Civilized Tribes" ("Five Tribes"), has an interest in ensuring that this Court is correctly informed as to the legal history of the Five Tribes in the context of federal law. *Amici* file this brief in support of the respondent.[1]

SUMMARY OF THE ARGUMENT

The Muscogee (Creek) Nation ("Creek Nation") has maintained a strong and resilient government on its reservation since its removal to Indian Territory in the 1830s. The federal allotment and statehood legislation involving Creek Nation near the end of the nineteenth century and the early part of the twentieth century was consistent with the contemporaneous implementation of federal allotment and assimilation policies throughout the United States. The survival of Creek Nation and its reservation is all the more remarkable in light of federal agency suppression of its

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On August 14, 2018, counsel for Petitioner and Respondent informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

government, and the United States' failure to protect Creek citizens and their allotments from rampant land frauds perpetrated throughout the reservation in the early twentieth century. This fraud was aided by the state's unlawful exercise of criminal jurisdiction over offenses on the Creek reservation.

Immediately after statehood, Oklahoma ignored federal statutes and state and federal court precedent concerning the jurisdictional status of Indian country. Meanwhile, federal officials waffled in their position regarding the enforcement of federal statutes applicable to reservations and, until the 1970s, brought few prosecutions for forgery, fraud, or murder on Indian country in Oklahoma, including crimes related to the taking of Indian lands and minerals.

For the past 111 years, there has been an unsuccessful state campaign to secure judicial acceptance of the legal fiction that Indian lands in Oklahoma do not have the same jurisdictional status as Indian lands in other states. This campaign ignores decades-old state and federal court decisions that allotment legislation in the late 1890s and early 1900s applicable to the former Indian Territory did not destroy the Indian country status of Indian allotments, tribal fee lands, and tribal trust lands or grant jurisdiction over these lands to the state. The reasoning in those decisions applies to reservations the same as it applies to these other forms of Indian country.

ARGUMENT

I. CONGRESS'S TREATMENT OF CREEK NATION WAS CONSISTENT WITH THE ASSIMILATION AND ALLOTMENT ERAS AND THE END OF THOSE ERAS.

A. Creek Reservation and the Assimilation and Allotment Policy in Indian Territory

Creek removal and the establishment of the Creek reservation in Indian Territory in the 1830s was consistent with contemporaneous federal policy that Indians should be separated from non-Indians and placed on reservations. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 2-3 (1984). After removal, the Five Tribes occupied their land under federal superintendence in an area that was "widely separated from white communities." *Marlin v. Lewallen*, 276 U.S. 58, 60-62 (1928). The Creek Nation initially secured fee title to its lands under an 1833 Treaty, such title to continue so long as it should exist as a nation and continue to occupy the country assigned to it. Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417. This title was later evidenced in a Presidential patent dated August 11, 1852. *Woodward v. De Graffenried*, 238 U.S. 284, 293-94 (1915).

The Creeks, a "peace-loving people," rebounded after removal. GRANT FOREMAN, THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE CIVILIZATION OF THE AMERICAN INDIAN 203 (1934). They built homes and ranches; established schools, including boarding schools; maintained ferries; and

were organized by tribal towns. ANGIE DEBO, THE ROAD TO DISAPPEARANCE – A HISTORY OF THE CREEK INDIANS 17, 19, 110, 116-21, 289, 332-33 (1941) ("ROAD"). They maintained a government under written constitutions, the most recent of which, before statehood, was the 1867 Constitution, with executive, legislative and judicial branches. *Woodward*, 238 U.S. at 293-94; DEBO, ROAD 179-80. They maintained a lighthorse police force and exercised civil and criminal jurisdiction with a judiciary applying an array of Creek laws and rules. DEBO, ROAD 181-82.

After the civil war, westward expansion caused a "shrinking reservoir of 'vacant' land." HOXIE 43. Federal policy began to shift, in part due to political, economic, and commercial expansion, and the efforts of well-meaning East Coast reform associations that campaigned for Indian equal rights. HOXIE 2-3, 11-13. The resulting assimilation and allotment policy became a dominant force in the late 1800s. Congress wanted Indians to receive their share of tribal lands, allow settlers to acquire the remaining lands, help Indians learn farming from non-Indian farmers, and transform Indians into prosperous citizens. D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8-9, 12-22, 77-80 (Francis Paul Prucha ed., University of Oklahoma Press 1973) ("OTIS"); HOXIE 75. Reservation dismantlement and tribal dissolution nationwide were also goals held by some federal policy makers, especially early in the allotment era. *Id.* at 11-12; 1885 Ann. Rep. of Comm. Ind. Aff. 26 (Oct. 5, 1885).

Congress sought to implement the assimilation and allotment policy nationwide for a number of reasons. None of these reasons suggest or support a theory that allotment, reservation disestablishment, or tribal dissolution were prerequisites for the formation of Oklahoma or any other state.

Critics characterized Indian reservations (regardless of whether owned by the United States in trust for the benefit of a tribe, or, in the case of Creek Nation, owned by the tribe in fee for the benefit of tribal members) as "communist." OTIS 11, 54-55. Criticism of communal ownership was a major factor in the federal push to allot lands in Indian Territory, where it was reported that a relatively small number of tribal citizens maintained control over large areas of land, contrary to treaties expressing intent that tribal lands were to be held by tribes for benefit of all tribal citizens. *Heckman v. United States*, 224 U.S. 413, 434, 438 (1912); *see also Woodward*, 238 U.S. at 297, 305. Allotment was intended to eliminate these land monopolies, to enable tribal citizens to enjoy equal benefit of the land as required by treaties, and "to educate the Indians in the benefits to be derived from separate occupancy and enjoyment of the land." *Woodward*, 238 U.S. at 297 n. 2, 309.

The outcry for lands by the large non-Indian population that surrounded reservations in the western United States by the late nineteenth century was another precipitating factor. As Texas and Kansas "began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them,

occupied only by Indians." *Smith v. Townsend*, 148 U.S. 490, 493 (1893). The non-Indian population flowed onto tribal lands in Indian Territory, *Marlin*, 276 U.S. at 58, 61-62, disregarding repeated proclamations by successive presidents "warning against such entry and occupation" in 1879, 1880, 1884, and 1885. *Smith*, 148 U.S. at 495-96. This influx included settlement in towns mostly occupied by non-Indians who, while having no legal claim to the underlying land, erected improvements "worth many thousands of dollars." *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916). This caused Congressional concern regarding the "equities" between the tribes who owned the lands and the non-citizens who had built the town site improvements. *Id.* at 477.

As a "logical part" of the allotment policy there were "frequent allusions to the fact that the Indians were of course making no use of natural resources which should be developed in the interests of civilization." OTIS 17-18. The rich Five Tribes natural resources added to the interest in removing tribal title through allotment and potentially making these resources, some of which were already subject to non-Indian development, even more accessible. These tribal natural resources included coal valued at more than $4.3 billion, timber, lands suitable for game preserves, and huge tribal oil and gas resources. 40 Cong. Rec. 1257 (1906) (statement of Mr. Reid); 40 Cong. Rec. 3213, 4390-92 (1906) (statement of Sen. LaFollette); DEBO, ROAD 197, 368; LOUIS WELSH ET AL., A HISTORY OF THE GREATER SEMINOLE OIL FIELD 6-7 (1981); "Oil

Fields Are Best in the World," Oklahoman, Mar. 26, 1905, at 1.

B. Allotment Process

In 1887, Congress enacted the General Allotment Act, also known as the Dawes Act. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. Lands of many tribes were allotted under this law, but it expressly excluded the Five Tribes and a few other Indian Territory tribes. *Id.* at § 8. An organization supporting allotment suggested, "Reservations should be taken first which are ripest for the work, where the way is clear, the risks small, the complications few." HOXIE 79. There was doubt in Congress whether it "had any authority to interfere with the rights of those Indians" in Indian Territory. 18 Cong. Rec. 191 (1886) (statement of Mr. Perkins).

Even after decisions by this Court recognizing the federal plenary power to achieve allotment with or without tribal consent, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), federal officials were still concerned that the conveyance of Five Tribes' fee title to their lands would be of questionable legal validity without tribal consent, and took the safer route by seeking agreements requiring execution of deeds by tribal officials. *Woodward*, 238 U.S. at 294-95, 307. While ending communal tribal title to land was not necessary to achieve statehood, it was a core feature of allotment policy; and allotment in the Indian Territory, as elsewhere, was viewed by some proponents as

facilitating eventual access to reservation lands by non-Indians.

The steadfast resistance of the Five Tribes to engage in negotiations for allotment of their lands led to the establishment of the Commission to the Five Civilized Tribes ("Dawes Commission"). Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 643-45. It required ten years of negotiations for the Dawes Commission to secure allotment agreements with all Five Tribes – but only after enactment of the coercive laws described in part III.B.3 of this brief.

C. End of Allotment Era

The allotment era was short-lived. "In the early twentieth century" policy makers were "questioning whether total assimilation was desirable at all" and believed that "ambitious assimilation programs could not succeed." HOXIE 112-13. Thus, "in the first decade of the 20th century . . . [t]otal assimilation was no longer the central concern of policy makers. . . ." *Id.*

In 1906, Congress withdrew plans to dissolve the Five Tribes, and continued tribal existence indefinitely. S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906); Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 ("Five Tribes Act"). A few years later, Congress ended the allotment of Creek lands. Act of Mar. 2, 1917, ch. 146, § 18, 39 Stat. 969, 983.

The 1934 Indian Reorganization Act ("IRA") officially ended the allotment era for all tribes. Act of June

18, 1934, ch. 576, Pub. L. No. 96-363, 48 Stat. 985, codified as amended at 25 U.S.C. §§ 5101, *et seq*. Most of the IRA applied to Oklahoma tribes, including provisions ending allotment, authorizing the Secretary to acquire lands for tribes and individual Indians and restore surplus reservation lands to tribal ownership, and establishing an Indian preference in federal employment. *See* §§ 1-3, 5, 6, 8-15, and 19, 48 Stat. 985, codified as amended at 25 U.S.C. §§ 5101-5103, 5108, 5109, 5111-5113, 5115, 5116, 5118, 5120, 5121, and 5129. Section 13, codified at 25 U.S.C. § 5118, provided that five IRA sections were inapplicable to Oklahoma tribes. These addressed transfers of restricted lands, proclamation of new reservations, organization under tribal constitutions and charters of incorporation, and tribal elections to accept or reject applicability of the IRA. §§ 4, 7, 16, 17, 18, 48 Stat. 985, codified at 25 U.S.C. §§ 5107, 5110, 5123, 5124, and 5125.

Two years after the IRA's passage, Congress enacted the 1936 Oklahoma Indian Welfare Act ("OIWA"), Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified as amended at 25 U.S.C. §§ 5201-5210. The OIWA included a section similar to the IRA sections concerning tribal constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209.

II. UNLAWFUL FEDERAL AGENCY INTERFERENCE WITH CREEK GOVERNMENT OBSTRUCTED TRIBAL PROTECTION OF ALLOTTED LANDS FROM STATE-SANCTIONED FRAUDULENT LAND TRANSACTIONS.

A. Introduction

Soon after the enactment of the Dawes Act, federal policy began to shift from treating Indian affairs as national concerns to viewing them as regional concerns, resulting in control by congressional members from states and territories west of the Mississippi. HOXIE 11, 12, 36-37, 104. Participation in Congress by western states with significant Indian populations (North and South Dakota, Montana, Washington, Utah, Wyoming, Idaho, Oklahoma, Arizona, and New Mexico) began upon each state's entry into the Union during a period between 1889 and 1912. *Id.* at 108. The western legislators were hostile to the campaign to achieve total assimilation. *Id.* at 111. "Optimism and a desire for rapid incorporation were pushed aside by racism, nostalgia, and disinterest." *Id.* at 113.

Consistent with changing federal policy early in the twentieth century, officials of the Department of the Interior ("DOI") and DOI's agency, the Bureau of Indian Affairs ("BIA"), unlawfully blocked Creek exercise of executive and legislative powers. This occurred simultaneously with the theft of Creek allotments through fraudulent land transactions sanctioned by the state, resulting in the impoverishment of Creek citizens. Due to "the inherent difficulty" in protecting

allotments, "the general effect of allotment was an orgy of plunder and exploitation probably unparalleled in American history." ANGIE DEBO, AND STILL THE WATERS RUN – THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 91 (1940) ("WATERS RUN").

B. Federal Agency Obstruction of Creek Government

The Creeks did not desire tribal dissolution and did not seek it during the allotment process, as shown by their determined struggle to resist allotment and to continue to exercise governmental powers after statehood. DOI nevertheless engaged in "bureaucratic imperialism" through its "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments," contrary to Congress's express preservation of Five Tribes governments in the Five Tribes Act, § 28, 34 Stat. 137. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

DOI's "efforts to ensure that any Creek government be subservient to Bureau wishes" began in 1907, shortly before statehood. *Harjo*, 420 F. Supp. at 1133. DOI claimed the Five Tribes Act's continuance of Five Tribes governments only applied to present incumbents in office. *Id.* at 1129, 1131-32, 1137. It also misinterpreted § 6 of the Five Tribes Act to justify its refusal to recognize any elected Chief absent a federal appointment, contrary to that section's limited purpose: to prevent disruption of the signing of allotment

deeds in the absence of an elected chief. *Id.* at 1126-27, 1132, 1138, 1141. For many years, DOI refused to recognize tribal elections to fill Council vacancies, refused to recognize the Chief's authority to call regular Council sessions without DOI approval, and often treated the Chief as the sole Creek governmental authority. *Id.* at 1114, 1133-34, 1139.

Creek leaders resisted, and began to hold the first of many annual "Creek Conventions" ("Convention") in 1909. *Harjo*, 420 F. Supp. at 1133. The Convention continued to meet regularly for decades, often without BIA recognition of its legitimacy. *Id.* at 1133-38. Between 1934 and 1951, the Chief, who was elected by the people and then appointed by DOI, and the Convention functioned much as the Council and Chief had earlier. *Id.* at 1136. The BIA briefly refused to recognize Creek government under a constitution and bylaws approved by the Convention in 1944, but recognized in 1946 that the Convention had been acting as the official governing body of the Tribe since 1924. *Id.* at 1137-38. In the early 1950s, BIA again shifted direction, and dealt with a Council appointed by the Chief, instead of the elected Convention. *Id.* at 1138-39.

In the mid-1950s, BIA returned to its practice of appointing unelected Chiefs and treated them as the sole embodiment of Creek governmental authority. *Harjo*, 420 F. Supp. at 1139. Congress, by Act of Oct. 22, 1970, Pub. L. No. 91-495, 84 Stat. 1091, responded by recognizing the right of Five Tribes citizens to elect their chiefs "by popular selection." BIA, in a "determined use of its raw power," then misinterpreted that

law to require a "government by Principal Chief alone." *Id.* at 1143.

The Creek government was explicitly perpetuated by the Five Tribes Act, with the right to elect chiefs, and to exercise legislative functions. *Harjo*, 420 F. Supp. at 1118, 1141-43. In spite of DOI's "failure to make a conscientious effort to adhere to the provisions of law in dealing with the Five Tribes," the Creeks "refused to abandon their tribal government and political life." *Id.* at 1135. In 1979, after their successful challenge of DOI's interference with their government in *Harjo*, the Creeks reorganized under the OIWA and adopted a new constitution, which was approved by DOI. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967, 970-71 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

C. Fraudulent Land Transactions and Impoverishment of Creek Citizens

In 1901, oil was discovered on the Creek reservation. DEBO, WATERS RUN 86-87. This provided an additional incentive to those who were already eager to take tribal lands. Even before statehood, land companies were formed in Indian Territory for the unlawful exploitation of Indians. *Id.* at 117. A 1903 investigation revealed that every member of the Dawes Commission and nearly every high DOI official in Indian Territory held stock in one or more of these companies, and most were listed as officers and directors. *Id.* at 118.

Under the 1901 and 1902 Creek allotment agreements, the allottees owned their allotments in fee, subject to restrictions against alienation ("restricted allotments") for a five-year period, and, in the case of forty-acre homesteads, for twenty-one years. Act of Mar. 1, 1901, ch. 676, ¶7, 31 Stat. 861; Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500. This protection of restricted allotments was seemingly strengthened when the Five Tribes Act increased the restricted period for fullblood allottees to twenty-five years. § 19, 34 Stat. 137, 144. This was the same period established in the Dawes Act's protection of allotments held in trust by the United States on behalf of Indians ("trust allotments") under that act. § 5, 24 Stat. 388.

However, federal policy was already shifting toward removing protection of Indian lands. Shortly before enactment of the Five Tribes Act, Congress began eroding the Dawes Act's protection of trust lands allotted under that act, by amending it to authorize the Secretary to issue fee patents to "competent" allottees. Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act"), codified at 25 U.S.C. § 349. In 1910, competency commissions started visiting reservations nationwide, and in the next two years more than 200,000 acres of trust land were placed on the local tax rolls. HOXIE 176. Sales of trust allotments also increased, with 775,000 acres of inherited land being sold between 1902 and 1910, which represented "only a fraction of the total territory lost during those years." *Id.* at 160.

Consistent with the national trend, in 1908, Congress removed restrictions on the Five Tribes

allotments of freedmen, intermarried whites, and Indians of less than one-half Indian blood. Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312. Congress also gave state courts authority over the person and property of minor Five Tribes restricted allottees and authority to approve conveyances of restricted lands of the heirs of deceased allottees, *id.* at §§ 2, 6, 9.[2] acting as federal instrumentalities. *Springer v. Townsend*, 336 F.2d 397, 400 (10th Cir. 1964); *United States v. Gypsy Oil Co.*, 10 F.2d 487 (8th Cir. 1925).[3]

The state courts were often complicit in the steady stream of fraudulent land transactions that ensued. The Creek government attempted to protect the land of its citizens against these illegal conveyances. DEBO, WATERS RUN 103, 120. In 1912, M.L. Mott, an attorney for the Creeks, provided a report to Congress funded with Creek funds, based on an examination of the files in pending guardianship cases in several counties, which was supplemented by the December 31, 1923

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[2] Congress extended the restricted period for Five Tribes allotments inherited by heirs of at least one-half Indian blood until further act of Congress. *See* Act of May 10, 1928, ch. 517, § 1, 45 Stat. 495; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, § 1, 69 Stat. 666. Congress has also recognized Creek Nation's reversionary interest in restricted lands of an intestate decedent without heirs. *See* Act of Aug. 29, 1967, Pub. L. No. 90-76, § 3, 81 Stat. 177.

[3] The United States still maintains a significant role in state court proceedings involving restricted lands, including notice requirements, option to remove certain state proceedings to federal court, DOI attorneys' entries of appearances in state court proceedings, and approval of attorneys' fees. *See* §§ 1, 3, 4, 61 Stat. 731-33.

report of S.E. Wallen, Superintendent, Five Civilized Tribes Agency, and Mott's January 9, 1925 update. M.L. Mott, "A National Blunder" ("Mott Rep.") at 3, 11. *Murphy v. Royal*, Case No. 15-7041 (10th Cir.), Appellant's Br., App'x E (filed Aug. 5, 2016). Adult Indians, upon coming suddenly into large incomes by reason of oil or mineral development of their property, were taken into court and declared incompetent. Mott Rep. at 16-44. Non-Indian guardians charged Indian estates "the unprecedented" sum of 19.3 percent of their value, compared with 2.3 percent of the value of non-Indian estates. Mott Rep. at 3-4. Many Indian guardianship costs ran from 30 percent to 60 percent, and these "unconscionable and unjustified" costs resulted exclusively from the state courts' allowance of attorney and guardian fees. *Id.*

The pillaging of children's estates was also common, often as a result of unconscionable contracts between land companies and parents, and the theft of their property through the probate courts. DEBO, WATERS RUN 104, 106, 182. In 1923, a committee of the Oklahoma Bar Association recognized the severity of this situation in a resolution criticizing the dissipation of estates of Five Tribes citizens by the state court appointment of guardians and administrators "wholly incapable of handling business affairs, many of them graduates of the bankruptcy court," and by appointment of attorneys "on fat salaries . . . while the widows, orphans and wards go hungry and poorly clad." Mott Rep. at 2.

The value of oil property was an added inducement to crime. Speculators who had secured illegal leases resorted to forgery, kidnapping, and murder to acquire permanent possession. DEBO, WATERS RUN 181, 200. In 1935, John Collier, Commissioner of Indian Affairs, testified about the continued plundering of Five Tribes allotted lands. Hearings before the Comm. Ind. Affs., House of Rep., 74th Cong., 1st Sess. on H.R. 6234, "A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes" (May 7, 1935) at 194-216. He described numerous cases, including one that involved a minor Creek heir of valuable oil lands, who was kidnapped by conspirators working for an oil company, taken across state lines, forced to sign relinquishment of her oil allotment while intoxicated, and raped. *Id.* at 197. She was paid $1,000 and given clothing in exchange for the property, which produced $315,178.41 in royalties. *Id.* A state court found the conveyance valid; the rapist was indicted but not convicted; and disbarment proceedings against an attorney involved in the case failed. *Id.*

"[T]he entire Five Tribes area was dominated by a vast criminal conspiracy to wrest a great and rich domain from its owners." DEBO, WATERS RUN 196-97. Federal and state officials found it expedient to leave concerns about criminal activities involving Indians in the hands of the state, driven by the interests of oil developers and others intent on seizing Creek natural resources.

III. UNLAWFUL STATE PROSECUTIONS OF CRIMES DO NOT EVIDENCE RESERVATION DISESTABLISHMENT.

A. Introduction

The state's prosecution of offenses on the Creek reservation involving Indian offenders and/or victims with federal acquiescence does not evidence reservation disestablishment. These prosecutions were contrary to federal statutes and state and federal decisions concerning the allocation of state and federal jurisdiction by the Act of June 16, 1906, ch. 3335, 34 Stat. 267 ("Enabling Act"). When state jurisdiction over Indian country in the former Indian Territory was challenged in the 1980s, state and federal courts specifically rejected arguments that the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act"), the Act of June 28, 1898, ch. 517, 30 Stat. 495 ("Curtis Act"), and the Enabling Act conferred jurisdiction to the state over all crimes arising in the former Indian Territory.

B. Criminal Jurisdiction in Indian Territory

1. General Crimes Act and Major Crimes Act

The United States' policy concerning criminal prosecutions in "the Indian country" began with federal enactments as early as 1796. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). As of 1883, this federal policy was embodied in the General Crimes Act ("GCA") (a/k/a "Indian Country Crimes Act"), Rev. Stat. §§ 2145 and 2146, codified as amended in 18 U.S.C. § 1152.

See Ex parte Crow Dog, 109 U.S. at 558. Offenses enumerated and defined under the general laws of the United States which were committed in "the Indian country" by Indians against "white persons", and by "white persons" against Indians,[4] were federal offenses, and those by Indians against each other in "the Indian country" were left to each tribe according to its local customs. *Ex parte Crow Dog*, *id.* at 571-72 (murder of Indian by another Indian on Sioux reservation subject to tribal, rather than federal, jurisdiction under § 2146).

In direct response to *Crow Dog*, Congress enacted the Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 ("MCA") (now codified, as amended, at 18 U.S.C. § 1153); *see United States v. Kagama*, 118 U.S. 375, 382-83 (1886); *United States v. John*, 437 U.S. 634, 649 n. 18 (1978). MCA conferred federal jurisdiction over certain enumerated major crimes by an Indian offender against an Indian or non-Indian victim, including murder, when committed on an "Indian reservation" within a state. § 9, 23 Stat. 362, 385.[5]

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[4] The federal government did not recognize tribal criminal jurisdiction over non-citizens in Indian Territory. 1886 Ann. Rep. of Comm. Ind. Aff. 91. It first began serious efforts to address the problem of non-Indian lawlessness by conferring criminal jurisdiction on federal courts located in adjacent states over offenses by the intruders, and later by establishing a federal court in Indian Territory. *See infra* n. 6.

[5] Reservation lands include fee lands within reservation boundaries. *United States v. Celestine*, 215 U.S. 278, 284-87 (1909). In 1948, MCA was amended to replace the term "reservation" with the broader term "Indian country," which was "used in most of the other special statutes referring to Indians. . . ." *See United States v. John*, 437 U.S. at 647 n. 16, 649 (citing 18 U.S.C. § 1153). The

2. 1890 Act and 1895 Act

In 1890, Congress authorized the establishment of a territorial government in portions of western and central Indian Territory, to be known as Oklahoma Territory. Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81 ("1890 Act"). The Five Tribes' reservations and a small area occupied by eight tribes served by the Quapaw Agency remained in the reduced Indian Territory. §§ 29-44, 26 Stat. 93-100.

The 1890 Act divided jurisdiction over Indian Territory among the three United States courts previously authorized to serve Indian Territory.[6] § 33-35, 26 Stat. 81, 96-97. As courts of local jurisdiction, the courts enforced certain listed Arkansas laws, except "if in conflict with this act or with any law of Congress" and enforced Arkansas criminal laws "as far as they are

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1948 amendments also added a definition of "Indian country" based on this Court's definitions of Indian country in decisions issued after enactment of MCA. 18 U.S.C. § 1151; *see Donnelly v. United States*, 228 U.S. 243 (1913) (reservations); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (dependent Indian communities); *United States v. Pelican*, 232 U.S. 442 (1914) (trust allotments); and *United States v. Ramsey*, 271 U.S. 467, 469 (1926) (restricted allotments).

[6] *See* Act of Jan. 31, 1877, ch. 44, 19 Stat. 230 (federal court in Ft. Smith, Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (federal court for northern district of Texas with jurisdiction over offenses in described areas not set apart for any of the Five Tribes "against any of the laws of the United States now or that may hereafter be operative therein"); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (federal court in Muskogee, Indian Territory, with jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory . . . not punishable by death or by imprisonment at hard labor").

applicable." §§ 31, 33, 26 Stat. 81, 94, 96. The application of Arkansas laws in Indian Territory was "merely provisional," to establish a body of laws for "matters of local or domestic concern" in the absence of a territorial government over Indian Territory. *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912).

The federal courts in Indian Territory additionally enforced general federal laws, such as GCA, consistent with the 1890 Act's requirement that "all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 81, 94. In cases where the laws of the United States and Arkansas laws concerned the same offense, "the laws of the United States shall govern as to such offense." *Id.* at § 33. "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases. *See id.* at § 30, 26 Stat. at 94." *Indian Country, U.S.A.*, 829 F.2d at 977-78.

In 1895, Congress repealed all laws that had previously conferred jurisdiction on the federal courts for the western district of Arkansas and the eastern district of Texas over certain offenses committed in Indian Territory, effective September 1, 1896. Act of Mar. 1, 1895, ch. 145, 28 Stat. 693 ("1895 Act"). The 1895 Act provided that "the jurisdiction now conferred by law upon said courts is hereby given from and after said date aforesaid to the United States court in Indian

Territory," and created three districts for that court. §§ 1, 9, 28 Stat. 693, 697. It gave the courts in Indian Territory "exclusive original jurisdiction of all offenses against the laws of the United States" committed in Indian Territory. *Id.* at § 9. The 1895 Act further provided that the laws of the United States and Arkansas "heretofore put in force in said Indian Territory" were to remain in "full force and effect" in Indian Territory, except so far as they were in conflict with the 1895 Act.

3. 1897 Act and 1898 Curtis Act

Two years later, Congress enacted the 1897 Act, which was "designed to coerce the tribes to negotiate with the Commission." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). The 1897 Act provided that after January 1, 1898, the federal courts in Indian Territory "shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed" after that date. 30 Stat. 62, 83. It further provided that "the *laws of the United States* and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race, said [federal] courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes." *Id.* (emphasis added). This "broadened the jurisdiction of the federal courts, thus *divesting the Creek tribal courts of their exclusive jurisdiction over cases*

involving only Creeks." Indian Country, U.S.A., 829 F.2d at 978 (emphasis added).[7]

The 1897 Act added an escape mechanism by providing that any agreement with a tribe, when ratified, would "operate to suspend any provisions of this Act if in conflict therewith as to said nation." 30 Stat. 62, 83. Congress understood that the threat to end exclusive Five Tribes jurisdiction over tribal members, together with this proviso, was "intended to drive them into an agreement with the Dawes Commission, and if they do not agree to it, they shall get this terrible blow. . . ." 29 Cong. Rec. 2310 (1897) (statement of Sen. Bate). ("One of the ugly features in this . . . is that while we are holding out to them the hand of negotiation we hold in the other hand a bludgeon with which to brain the Indian. Shame upon us!"). *Id.*

This coercion continued in the 1898 Curtis Act, which included numerous provisions related to the division of tribal lands into allotments for the use and occupancy of tribal citizens. 30 Stat. 495. One of the most coercive measures provided for the potential abolishment of "all tribal courts in Indian Territory" and the transfer of tribal court cases to the federal

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[7] Although lacking in clarity, the 1897 Act threatened an implied repeal of provisions in the 1890 Act, § 31, 26 Stat. 94, 96 (which preserved exclusive jurisdiction in "the courts of the civilized nations" over all cases involving tribal members as the sole parties). *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that the Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in the Cherokee Nation under its treaties and the 1890 Act).

court in Indian Territory effective July 1, 1898, subject to the proviso that the Chickasaw, Choctaw, and Creek courts would be abolished effective October 1, 1898 unless they ratified agreements contained in § 29 (Choctaws and Chickasaws) and § 30 (Creeks) of the act. § 28, 30 Stat. 495, 504-05.

The Choctaws and Chickasaws ratified their agreement on August 24, 1898, before the deadline. Sixth Ann. Rep. of the Comm. Five Civ. Tribes (1899) at 9. The agreement, which was controlling over inconsistent provisions of the Curtis Act (except § 14, involving incorporation of towns), did not abolish Choctaw and Chickasaw courts, and included only a limited grant of federal court jurisdiction over certain land matters, homicide, embezzlement, bribery, disturbance of the peace, and carrying weapons. 30 Stat. 495, 505, 511.[8]

The Creeks did not ratify the agreement in § 30 of the Curtis Act, 30 Stat. 495, 514, by the deadline, and their later agreement provided that nothing in it would be construed to revive their courts. ¶47, 31 Stat. 861; *Woodward*, 238 U.S. at 311-12. However, the Creek agreement did not cede or return any Creek lands to the public domain, consistent with the continued existence of the reservation.

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[8] *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1441-42. An appropriations act, Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1027, later purportedly abolished Choctaw and Chickasaw Nation courts.

Congress ratified the Seminole Agreement, which expressly protected Seminole courts and contained only a limited grant of federal jurisdiction similar to the Choctaw and Chickasaw agreement, two days after enactment of the Curtis Act. Act of July 1, 1898, ch. 542, 30 Stat. 567.

The Cherokees were the last to enter into an agreement. Act of July 1, 1902, ch. 1375, 32 Stat. 716. Earlier unratified versions of the Cherokee agreement provided for the extinguishment of their courts. Sixth Ann. Rep. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57; Seventh Ann. Rep. of the Comm. Five Civ. Tribes (1900) at 13, Appendix No. 1, § 80 at 37, 45. However, these provisions were omitted from the ratified agreement, which expressly provided that inconsistent statutes would not be in force, and expressly preserved only §§ 14 and 27 of the Curtis Act. § 73, 32 Stat. 716.

This inconsistent application of the 1897 Act and § 28 of the Curtis Act to the Five Tribes reflects the intent to force allotment – not to disestablish the Creek reservation for purposes of statehood. This interpretation is consistent with the 1936 enactment of the OIWA. The D.C. Circuit found that the OIWA, 25 U.S.C. § 5209, repealed the Curtis Act, and re-established Creek judicial authority, "subject to limitations imposed by statutes generally applicable to all tribes." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1446-47. In reaching that conclusion, the Court rejected statutory interpretation offered by DOI that "would result

in a perpetuation of the piecemeal legislation rather than its elimination." *Id.* at 1445-46.

4. 1906 Oklahoma Enabling Act

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 ("Enabling Act") ended any speculation as to the meaning of the 1897 Act, by replacing the application of Arkansas laws after statehood with "the laws in force in the Territory of Oklahoma, *as far as applicable*,"[9] "until changed by the legislature thereof." § 13, 34 Stat. 267, 275 (emphasis added). Section 16, as amended in 1907, required the transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286. This includes crimes under GCA and MCA. *See United States v. Ramsey*, 271 U.S. 467, 469 (1926). Conversely, § 20 of the Enabling Act, as amended in 1907, established

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[9] The limited applicability of state criminal laws on the Creek reservation is reflected not only in the history leading up to enactment of the Enabling Act, but also by the Assimilative Crimes Act. Act of Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145, codified as amended in 18 U.S.C. § 13. The Assimilative Crimes Act authorizes federal courts to apply state laws defining offenses and punishments to crimes in Indian country within the state, in the absence of a federal law defining such offenses. *See Williams v. United States*, 327 U.S. 711, 718 (1946). *See also* Indian Country Criminal Jurisdictional Chart, W.D. OK (December 2010 version) at https://www.justice.gov/sites/default/files/usaowdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf.

state courts as successors to federal courts in Indian Territory for those civil and criminal cases that were not transferred to the new federal courts. § 3, 34 Stat. 1286, 1287.

Additionally, the Enabling Act preserved federal jurisdiction over Indians and their lands, § 1, 34 Stat. 267-68, and required the state to disclaim all right and title to such lands. § 3, 34 Stat. 267, 270. The Oklahoma Constitution contains the required disclaimer. Okla. Const. art. 1, § 3.

C. State and Federal Prosecutions in the Early History of the State

When Oklahoma became a state, Proclamation of Nov. 16, 1907, 35 Stat. 2160-61, it was already well settled that the authority of the United States to prosecute crimes not committed by or against Indians on reservations ended at statehood. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240 (1896). Despite having no legal basis, federal and state officials acted as if statehood also marked the end of federal authority over prosecutions of all crimes by or against Indians in "Indian country" under GCA and on "reservations" under MCA.

This viewpoint was contrary to an early Oklahoma Supreme Court decision, *Higgins v. Brown*, 94 P. 703, 730 (Okla. 1908). Although *Higgins* did not involve claims that the crime occurred on a reservation, it provided guidance regarding any future cases involving Indian country jurisdiction. The Court found that § 16

of the Enabling Act was "intended to vest in the federal courts the continued prosecution of criminal cases of a federal character and to continue in the state courts the prosecutions of a local or municipal character." *Id.* at 725. It accordingly found that prosecutions under "a general law relating to crime against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state" (such as MCA and GCA) were to be transferred to the federal courts. *Id.* at 725. *See also Ex parte Buchanen*, 94 P. 943, 944-45 (Okla. Crim. App. 1908); *Ex parte Curlee*, 95 P. 414 (Okla. Crim. App. 1908) ("Of course, non-pending actions of a federal character would necessarily vest in the United States courts in the state erected out of said [Oklahoma and Indian] territories just as they do in United States courts in the other states.").

A few years after these Oklahoma decisions, this Court ruled that Oklahoma statehood did not change the Indian country status of lands in Indian Territory or the applicability of federal criminal laws on those lands. *United States v. Wright*, 229 U.S. 226 (1913).[10] In *Wright*, the United States charged the defendant in federal court in Oklahoma for violation of Rev. Stat. § 2139, which prohibited introduction of liquor into "Indian country." *Id.* at 226-27. This Court concluded

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[10] An earlier decision of this Court, *Hendrix v. United States*, 219 U.S. 79, 90 (1911), offers no guidance. It did not address or reference GCA, MCA, the reservation status of the crime site, or the United States' argument that the Enabling Act withdrew Indian Territory from federal jurisdiction.

that § 2139 was applicable to "Indian country" throughout the states and territories generally, and that the Enabling Act did not repeal its applicability in Oklahoma. *Id.* at 238; *see also United States Exp. Co. v. Friedman*, 191 Fed. 673, 678-79 (8th Cir. 1911) (rejecting broad contention "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state"); and *Southern Surety Company v. State of Oklahoma*, 241 U.S. 582, 585-86 (1916) ("[T]he test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed.").

In sum, any claim that state prosecutions of all crimes in Creek Nation constituted "universal acknowledgement" of reservation disestablishment cannot withstand the principles set forth in early state and federal judicial interpretations of the Enabling Act.

D. State Failure to Follow Supreme Court Decisions Recognizing Federal Criminal Jurisdiction over Offenses on Trust and Restricted Allotments

Less than two years after statehood, state and federal prosecutors were put on notice that trust allotments are Indian country for purposes of prosecutions under GCA. In *United States v. Pelican*, the Court held that Colville trust allotments "remained Indian lands set apart for Indians under governmental care" and were Indian country for purposes of a federal murder prosecution under GCA, Rev. Stat. § 2145. *Pelican*, 232

U.S. at 449. The Court declared that the United States' territorial jurisdiction did not "depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 449-50.

If there was any question that a restricted allotment in Oklahoma is Indian country for purposes of prosecutions under GCA, this Court resolved that question in *Ramsey*, 271 U.S. at 471-72.[11] Citing the *Pelican* case, the Court ruled that a restricted Osage allotment crime site was Indian country for purposes of the GCA prosecution of two non-Indians for the murder of an Osage. *Id.* This decision put state and federal officials on notice that the federal courts had jurisdiction under the GCA over offenses on trust and restricted allotments, regardless of reservation status, including prosecutions of non-Indians for crimes against Indians. Yet the state continued its unlawful prosecutions. This exercise of jurisdiction did not impact the Indian country status of Creek reservation lands. *See United States v. John*, 437 U.S. at 652-54.

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[11] Federal investigation of the *Ramsey* case, which involved one of the numerous murders motivated by greed for the huge wealth of Osage mineral headright owners, was prompted by J. Edgar Hoover's desire to avoid scandal and protect his 1924 appointment as the director of the "Bureau of Investigation." DAVID GRANN, KILLERS OF THE FLOWER MOON – THE OSAGE MURDERS AND THE BIRTH OF THE FBI 116, 120 (2017). Because it was believed that it was "not only useless but positively dangerous" to try the case in the state legal system, federal attorneys filed the case in federal court, after which an appeal of dismissal on jurisdictional grounds reached this Court. *Id.* at 214.

E. Continued Unlawful State Prosecutions: *Nowabbi* and Public Law 280

State and federal prosecutors largely ignored the *Ramsey* decision, and persevered in their position that the state had jurisdiction to prosecute all crimes on all lands in the former Indian Territory. OCCA agreed with the state's position in 1936 and ruled that the state court had jurisdiction to prosecute the Choctaw murder of a Choctaw on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936) (overruled in *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989)). The Court found that land within the former Indian Territory was not Indian country within the meaning of GCA and was not a reservation within the meaning of MCA. OCCA erroneously concluded the Burke Act, which applied only to allottees under the Dawes Act, took "the Indians in the Indian Territory out of the category of Reservation Indians," and limited "the jurisdiction of the United States over allotments in the Indian Territory." *Id.* at 1154.

When Congress enacted the Act of Aug. 15, 1953, ch. 505, Pub. L. No. 66-280, 67 Stat. 588 ("P.L. 280") in 1953, Oklahoma declined to exercise the option of voluntarily assuming complete civil and criminal jurisdiction over Indian country within its boundaries. Fifteen years later Congress amended P.L. 280 to require tribal consent to acquire such jurisdiction. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 80, codified 25 U.S.C. §§ 1321-1326. Oklahoma has never requested

tribal consent, nor has it been given. *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978).

F. Recognition of Indian Country in Oklahoma

Although the state's claim of Creek reservation disestablishment is the only issue in the present case, it is important to consider Oklahoma-specific court decisions involving restricted trust allotments, unallotted tribal fee lands, and tribal trust lands that have been issued during the past forty years. These decisions have repeatedly rejected a theory, once again advanced by Petitioner and *Amici* in this case, based on misinterpretation of the 1897 Act, the 1898 Curtis Act, and the Enabling Act. They also caused a seismic shift in the jurisdictional landscape in Oklahoma beginning in the late 1970s.

The state's unlawful exercise of criminal jurisdiction affected all Indian lands within its borders for the first seventy years of statehood, including Indian trust allotments in western Oklahoma. This changed in 1978, when OCCA held that a Kiowa trust allotment was Indian country under 18 U.S.C. § 1151(c), and that prosecution of a Kiowa for the murder of a Kiowa was subject to federal jurisdiction. *State v. Littlechief*, 573 P.2d at 265; *see also Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (Kiowa trust allotment is Indian country); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (*Ramsey* applies to crime on restricted Osage allotment held by an heir

of original allottee). The Indian country status of trust allotments in western Oklahoma is so well settled that for the past twenty years the Office of the United States Attorney, Western District of Oklahoma, has maintained an Indian country misdemeanor docket for certain offenses in Indian country in western Oklahoma, particularly those where a non-Indian is the perpetrator and there is an Indian victim. United States' Attorney's Office, W.D. Okla., "Indian Country Misdemeanor Prosecution Project," *Tribal Justice*, Issue 2 (2012) at 2.[12]

The Indian country status of restricted allotments and tribal trust and fee lands in eastern Oklahoma is equally well settled. In 1986, the Oklahoma Supreme Court rejected the state's claim that it had jurisdiction to regulate bingo games operated on tribal trust lands by the Seneca-Cayuga Tribe, a small tribe that remained in Indian Territory after passage of the 1890 Act. *May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 78 (Okla. 1986). After describing pre-statehood federal laws that specifically referenced "Indian Territory," including the 1890 Act, the 1897 Act, and the Enabling Act, *id.* at 81 n. 16, the Court determined that Seneca-Cayuga trust land is Indian country as defined by § 1151(c), citing *Pelican*, *Burnett* and *Littlechief*. *Id* at 82, 83 n. 21-24.

In 1989, OCCA ruled that an individual restricted Cherokee allotment in the former Indian Territory is Indian country for purposes of criminal jurisdiction.

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[12] *See* https://turtletalk.files.wordpress.com/2012/11/tribal-justice-issue-2-final.pdf.

State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989). OCCA expressly overruled *Nowabbi*, noting "[t]here is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion." *Id.* at 404; *see also Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (finding no jurisdiction over a murder on a restricted Chickasaw allotment and rejecting the United States' position that Oklahoma has exclusive jurisdiction over the former Indian Territory as a "result of congressional enactments around the turn of the century," citing *Seneca-Cayuga* and *Klindt*).

The first federal case involving Indian country jurisdiction in Creek Nation involved the state's unsuccessful attempt to regulate tribal bingo operations on Creek unallotted land (known as the Mackey site). *Indian Country, U.S.A., Inc.*, 829 F.2d at 976. The Tenth Circuit found "unpersuasive" Oklahoma's argument that it acquired complete jurisdiction of the Five Tribes' members and their lands within the former Indian Territory based upon a "combination of federal legislation enacted prior to statehood and language in the Oklahoma Enabling Act." *Id.* at 976-77. The Court concluded these laws did not divest the federal government of authority over Creek tribal lands, did not abolish Creek Nation's legislative authority of such lands, and did not evince a clear intent by Congress to permit the state to assert jurisdiction. *Id.* at 981. The United States agreed that the Tenth Circuit "correctly analyzed the complex history of congressional dealings

with the Creek Nation and its land" when it opposed the state's petition for certiorari,[13] which was denied.

A few years later, *after* the United States' successful federal court prosecution of a Creek for murder of a Creek on a restricted allotment under MCA, the United States changed course in the case on appeal and returned to "its frequently raised, but never accepted, argument" that the federal courts had no jurisdiction based on the 1897 Act, the Curtis Act, and the Enabling Act. *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993). The Tenth Circuit disagreed, finding that these laws "did not abrogate the federal government's authority and responsibility, nor allow [criminal] jurisdiction by the State of Oklahoma" over restricted Creek allotments. *Id.* at 1062. *See also Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land is Indian country); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (Choctaw tribal trust land is Indian country).

The existence of Indian country in western and eastern Oklahoma has been well established by state and federal decisions for decades. These decisions have repeatedly rejected the United States'

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[13] Br. for U.S. as *Amicus Curiae*, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, No. 87-1068 (U.S. Oct. Term 1987) at 4. The United States also stated that, although Creek lands acquired under the removal treaties were not referred to as a reservation, the lower court correctly found "that no such formal designation is required." *Id. See* https://www.justice.gov/osg/brief/oklahoma-tax-commission-petitioner-v-muscogee-creek-nation-et-al.

misunderstanding of pre-statehood laws and state prosecutors' blanket assertion of state jurisdiction in the former Indian Territory. The federal government has recognized that Oklahoma has no jurisdiction over Indian against Indian offenses in Indian country since 1979, when it established Courts of Indian Offenses serving western Oklahoma, "Law and Order on Indian Reservations," 44 Fed. Reg. 37502-01 (June 27, 1979), and again in 1992 when it established such courts in eastern Oklahoma for those tribes that had not yet developed tribal courts. "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992). The Creek and Cherokee Nations were already operating court systems and continue to do so. The Courts of Indian Offenses serving the Choctaw, Chickasaw, and Seminole Nations have also been replaced with tribal courts.

Any theory that pre-statehood allotment laws disestablished the Creek reservation cannot be reconciled with the decisions involving the Indian country status of restricted allotments and tribal trust and fee lands in eastern Oklahoma. A finding by this Court that the Enabling Act and other federal legislation resulted in Creek reservation disestablishment would cast a shadow over these precedents and cause statewide repercussions concerning their implementation.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

List of *Amici Curiae*

Gregory Ablavsky (Ph.D., J.D., University of Pennsylvania) is an assistant professor at Stanford College of Law. Dr. Ablavsky's scholarship focuses on early American legal history, particularly on issues of sovereignty, territory, and property in the early American West. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include "Beyond the Indian Commerce Clause," 124 YALE L.J. 1012 (2015) and "The Savage Constitution," 63 DUKE L.J. 999 (2014). His book project "Federal Ground: Sovereignty, Property, and Law in the U.S. Territories, 1783-1802," is under contract with Oxford University Press. His work has received the Cromwell Article Prize and the Kathryn T. Preyer Prize from the American Society for Legal History.

C. Joseph Genetin-Pilawa (Ph.D., Michigan State University) is Associate Professor of History at George Mason University, and co-editor of the *Journal of the Gilded Age and Progressive Era* (2017-2022). Dr. Genetin-Pilawa is the author of *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (University of Nebraska Press, 2012), and the co-editor of *Beyond Two Worlds: Critical Conversations on Language and Power in Native North America* (SUNY Press, 2014). He has held fellowships at the Smithsonian Institution and at the Kluge Center (Library of Congress).

Frederick Hoxie (Ph.D. Brandeis University) is Professor Emeritus of History at the University of Illinois,

Urbana-Champaign. His scholarship focuses on the history of indigenous peoples in North America. He has written numerous books, book chapters and articles, including *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984), and *"The Reservation Period, 1880-1960,"* in The Cambridge History of the Native Peoples of the Americas, North America (1995). Dr. Hoxie's research has been supported by fellowships from the Rockefeller and Mellon Foundations, the National Endowment for the Humanities, and the Huntington Library.

Stacy Leeds (J.D., University of Tulsa College of Law, LLM University of Wisconsin Law School) is Dean Emeritus and Professor, University of Arkansas School of Law.[1] Her publications include *Mastering American Indian Law* (2016), "Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas," Kansas Law Review (2011), and "Defeat or Mixed Blessing – Tribal Sovereignty and the State of Sequoyah," Tulsa Law Review (2007). Professor Leeds has received many awards, including the American Bar Association's Spirit of Excellence Award. She is an elected member of the American Law Institute and was an Alphonse Fletcher, Sr. Fellow with affiliation to the W.E.B. DuBois Institute at Harvard University and a William H. Hastie Fellow, University of Wisconsin. Professor Leeds is a Cherokee citizen, has served as a Cherokee Nation Supreme Court Justice and is the only

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[1] This brief is filed on behalf of Stacy Leeds in her personal capacity. Title is for identification purposes only.

American Indian woman to have served as law school dean in the United States.

Tom E. Luebben (G.Pe., Colorado School of Mines, J.D., New York University School of Law) has taught as adjunct professor of law at the University of New Mexico, guest lectured at the University of Arizona School of Law, and has taught seminars on tribal jurisdiction, Indian land rights, and many other areas of federal Indian law. Mr. Luebben's practice focuses on tribal government representation and protection of tribal natural resources. He served as lead counsel for the plaintiffs in *Harjo v. Kleppe*, and has represented Indian tribes, organizations and individuals located throughout the United States, including Oklahoma, Alaska, Arizona, California, Colorado, Hawaii, Nevada, and New Mexico.

Devon A. Mihesuah (Ph.D., Texas Christian University) is the Cora Lee Beers Price Teaching Professor in International Cultural Understanding, University of Kansas. Dr. Mihesuah, a Choctaw member, is the author of *Ned Christie: The Creation of an Outlaw and Cherokee Hero* (University of Oklahoma Press 2018), *Choctaw Crime and Punishment: Intersections of Resistance, Politics and Justice*, 1884-1907 (University of Oklahoma Press 2009); and has published numerous journal essays, book chapters, and commentaries. She served as editor of the American Indian Quarterly for nine years, and is the recipient of grants, fellowships and awards from the Ford Foundation, National Endowment for the Humanities, Smithsonian Institution,

Oklahoma Writers' Federation, and Oklahoma Historical Society, among many other organizations.

Lindsay Robertson (M.A., Ph.D. History, J.D., University of Virginia) is the Faculty Director of the Center for the Study of American Indian Law and Policy, University of Oklahoma College of Law; Chickasaw Nation Endowed Chair in Native American Law; and Sam K. Viersen Family Foundation Presidential Professor. Dr. Robertson teaches courses in Federal Indian law, comparative and international indigenous peoples law, and constitutional law and legal history. He is the author of *Conquest by Law* (Oxford University Press 2005). He is the founding director of the International Human Rights Law Clinic, was the recipient of the first David L. Boren Award for Outstanding Global Engagement, is an elected member of the American Law Institute and the American Bar Foundation, and serves as a justice on the Supreme Court of the Cheyenne and Arapaho Tribes.

Casey Ross (J.D., M.B.A., Oklahoma City University) is the Director of the American Indian Law and Sovereignty Center at Oklahoma City University (OCU) School of Law, where she oversees the American Indian Law program, teaching the American Indian wills clinical course and doctrinal courses that include tribal law and Federal Indian law. Professor Ross also serves as OCU general counsel and as faculty for the Native American Enterprise Management Certificate Program, OCU Meinders School of Business. Professor Ross' scholarship focuses on Indian land and property issues in Oklahoma. She has published works in the

areas of Indian child welfare, domestic violence and taxation in tribal communities. Professor Ross is a member of the Cherokee Nation.

Mark R. Scherer (J.D., Ohio State University; Ph.D. University of Nebraska-Lincoln) is Professor of History at the University of Nebraska-Omaha, where he teaches and publishes primarily in the fields of U.S. political, legal, and constitutional history, the regional history of Nebraska and the Great Plains, and Native American legal history. His publications include *Imperfect Victories: The Legal Tenacity of the Omaha Tribe*; and *Voices of Native American History: Challenges of the Contemporary World, 1933 to the Present*. He has recently completed *Echo of Its Time: The History of the Federal District Court of Nebraska, 1867-1933*, co-authored with John R. Wunder.

Rennard Strickland (J.D., S.J.D., University of Virginia), is the senior scholar in residence at the University of Oklahoma School of Law and the Knight Dean Emeritus at the University of Oregon School of Law. Dr. Strickland, a member of the Cherokee Nation, is the only faculty member tenured at all three of the ABA approved law schools in Oklahoma. He was the editor-in-chief of the revision of *Cohen's Handbook on Federal Indian Law* (1982 ed.). His many books include *The Indians of Oklahoma* (University of Oklahoma Press 1980) and *Fire and the Spirits, Cherokee Law from Clan to Court* (University of Oklahoma Press 1975). Dr. Strickland has served as president of the Association of American Law Schools and dean at four different law schools.

No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY
Petitioner,

v.

PATRICK DWAYNE MURPHY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI CURIAE[1]

The International Municipal Lawyers Association ("IMLA") advocates for local governments and their attorneys by highlighting the critical role that local governments play in the daily lives of millions of people around the world. IMLA has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The National Sheriffs' Association (the "NSA") is a non-profit association organized under §501(c)(4). Formed in 1940, the NSA seeks to promote

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[1] Pursuant to Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae*, their members, or its counsel made a monetary contribution to its preparation or submission.

The parties' have granted consent to this filing.

the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

Amici's members are the local government officials that manage and advise their clients on matters ranging from zoning and taxation to regulations of marijuana and drones. The nearly four million residents in the state of Oklahoma greatly depend on local governments to provide essential services that are not provided at the federal or state level. The outcome of this case will directly impact *amici's* members and the citizens who rely on them.

SUMMARY OF THE ARGUMENT

It is undeniable that the murder of George Jacobs was brutal, callous, and needless. It is equally undeniable that the circumstances which brought the Creek Nation to Oklahoma were similarly abhorrent. However, the impact of upholding the Tenth Circuit's decision will reverberate far beyond the facts and history of this case. This Court should consider the devastating impact that upholding this decision will have not only on the state, but its political subdivisions and the citizens of Oklahoma as well.

The state of Oklahoma is tasked with providing for the health, safety, and welfare of its citizens. State governments provide this protection through strong cooperative relationships with local governments. Local governments provide the vast majority of services on which citizens rely. For example, through local governments, Oklahomans receive an education, are protected from crime, obtain clean water, access power, acquire necessary business licenses, interact with the justice system, and much more.

Beyond these responsibilities, local governments also serve as the most fundamental and closest form of government for citizens. As a nation founded on the principles of federalism and self-rule, local governments serve as a shining beacon of democracy where citizens come together to make decisions that directly impact their daily lives. By upholding the Tenth Circuit's decision, this Court

could make it impossible for Oklahoma's local governments to fulfill that duty to its citizens.

If this Court affirms the decision below, the mischief wrought by the Tenth Circuit's decision will be magnified, as litigants are likely to test the boundary between this decision in a criminal case and matters involving civil jurisdiction. If applied to civil jurisdiction, at a minimum the functions of local governments could be greatly impaired, if not completely destroyed. The existing funding and taxation schemes, zoning laws, and licensing and regulatory schemes would be dramatically affected. The basic blocks of a democratic society — local governments — could be fundamentally altered if the Tenth Circuit's decision stands.

ARGUMENT

The 1866 territorial boundaries of the Creek Nation encompass eight counties of Oklahoma, over 4,600 square miles of land populated by more than 750,000 people, constituting 24.15% of the total population.[2] These eight counties and the greater Tulsa area are home to an American Airlines hub, top

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[2] The area within the Creek boundaries as decided by the Tenth Circuit decision include eight counties in the greater Tulsa area. There are four other tribal boundaries that may be implicated as Congress addressed these boundaries through the same legislation. This "implicated area" encompasses forty of the seventy-seven counties in Oklahoma, nearly half of the state by population, and half of the state by land. UNITED STATES CENSUS BUREAU, https://www.census.gov/2010census (last visted July 26, 2018).

research universities, the iconic Golden Driller, and some excellent bar-b-que. Millions of tourists travel to and through Tulsa from around the world each year. In addition to the Creek Nation, the decision of the case could extend to the remaining members of the "Five Civilized Tribes", whose lands collectively make up an area consisting of about 43% of Oklahoma's land mass and which is home to nearly 1.8 million residents.[3] The results of this case will not only impact nearly the entire eastern half of Oklahoma, but will reach far beyond, affecting businesses, visitors, and potentially other states.

I. IN THE WAKE OF THE TENTH CIRCUIT DECISION, PARTIES ARE LIKELY TO TEST THE BOUNDARIES BETWEEN FEDERAL CRIMINAL JURISDICTION AND FEDERAL CIVIL JURISDICTION THROUGH LITIGATION, CASTING DOUBT ON EVERY ASPECT OF MUNICIPAL LAW

The application of federal criminal law to the entire area that the Tenth Circuit deemed "Indian Country"[4] has monumental implications for civil and regulatory jurisdiction that would throw the State of

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[3] THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, http://www.fivecivilizedtribes.org/ (last visited July 19, 2018)

[4] "Indian Country" is defined at 18 U.S.C. § 1151 to delineate the extent of federal criminal jurisdiction over such lands, but this Court recognizes that it also generally applies to issues of civil jurisdiction.

Oklahoma, as well as its many local governments, into chaos.[5] This Court has held that where federal and tribal laws are applied criminally, civil federal, and tribal jurisdiction often follow. *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 427–428 (1975). Even when the line between criminal and civil jurisdiction is less clear, the decision of whether federal or state jurisdiction applies would likely need to be made by the federal court system, which would result in adding to an already overcrowded federal docket and would meanwhile disrupt normal activities in Tulsa and the surrounding communities while federal courts work through this decision.

If this Court affirms the decision below, jurisdiction over nearly half the state of Oklahoma may be ceded from state and local governments to federal and tribal governments. In *DeCoteau*, this Court held that state courts have criminal *and* civil jurisdiction over Native Americans after its reservation designation is terminated because the land is no longer "Indian Country". *Id.* In contrast, where this Court finds that the land involved is still designated as a reservation (or even more generally, as "Indian Country", allotted or otherwise), federal and tribal governments maintain criminal and civil authority, especially when Native Americans are party to the issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480

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[5] For respect to the law, this brief will refer to land as defined by 18 U.S.C. § 1151 as "Indian Country". For respect to the Creek Nation and all Native Americans, this brief will use Native Americans and tribes to refer to native peoples.

U.S. 9, 18 (1987); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-389 (1976).

There is a long-standing federal policy of encouraging tribal authority and self-governance of Native American peoples and "Indian Country" lands.[6] This policy reflects the idea that Native Americans retain some attributes of sovereignty over the "Indian Country" lands. Yet, there is no bright line rule for determining when a state or local law applies in "Indian Country". *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). Further, the ambiguities in federal law are often generously construed in favor of tribal sovereignty and independence.

State and local laws generally do not apply to Native Americans in "Indian Country" unless expressly provided for by Congress.[7] In *Montana v. United States*, this Court recognized that the sovereign powers of an Indian tribe generally do not

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[6] *See, e.g., Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014); *Iowa Mut. Ins. Co.*, 480 U.S. 9 at 14, 18; *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138, n. 5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144 & n. 10 (1980); *Williams v. Lee*, 358 U.S. 217, 220–221 (1959).

[7] *McClanahan*, 411 U.S. at 170–71 (1973).

extend to the activities of non-Native Americans in "Indian Country". 450 U.S. at 565. However, the Court further explained that tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Native Americans in "Indian Country". More specifically, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements..." *Montana v. United States*, 450 U.S. 544, 565 (1981); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384, 391-392 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905); *Washington*, 447 U.S. 134 at 152–154.

Further complicating this analysis, the Court later held that the "consensual relationship" exception detailed in *Montana* requires that the tax or regulation imposed by the tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). In addition to the exception for consensual relationships, Native Americans and tribes may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566; *Fisher*, 424 U.S. at 382, 386; *Williams*, 358 U.S. at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898). According to this precedent,

courts should weigh factors such as what constitutes a strong enough relationship with or big enough threat to the welfare of the tribe to determine if the tribe has power to regulate the conduct of non-Native Americans tribal lands. The lack of a bright-line rule and the increased complexity of the balancing test will throw nearly every decision, particularly decisions on taxation and licensing, that is made at the local level to federal courts, exacerbating the existing backlog and preventing local governments from functioning normally.

Though, as described above, tribal sovereignty is not unlimited, this Court has consistently acknowledged that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Montana*, 450 U.S. 544 at 565–566; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–153 (1980); *Fisher*, *424 U.S.* at 387-389; *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014). Lower courts have recognized that if a tribe has authority to regulate non-Native American conduct, that regulation can be done through civil tort law as well as through precisely-tailored regulations. *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 939 (9th Cir. 2009); *Dolgencorp*, 746 F.3d at 172-73. Accordingly, the decision below implicates not

only civil and criminal jurisdiction, but tribal taxation and regulatory authority as well.

For taxation in particular, this Court has held that there is a strong presumption against state and local taxation authority in "Indian Country", especially over Native Americans. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170–171 (1973). Powers of taxation and licensing are central to local governments. These tools serve as the primary means by which local governments are able to fund the projects and services that maintain local communities. The ability to license also allows local communities, through their local government, to ensure the businesses in their community rise to specific health and safety standards. If the impacted area is deemed to be "Indian Country", this Court would potentially rob local governments of their ability to care for their communities.

Balancing tests and ambiguous precedents such as those detailed above for determining jurisdiction create enormous uncertainty. It is impossible to predict how the decision below will play out long-term because of the lack of precedent on point; never in our nation's history has such a large area of land been ceded back to tribal control. Given the wide range of these precedents, the fallout could very well impact the everyday lives of the nearly two million Oklahoma citizens residing in the half of the state at issue in this case, in realms ranging from criminal and civil jurisdiction to taxation and regulatory authority.

II. MUNICIPALITIES MAY NOT BE ABLE TO COLLECT TAXES TO FUND VITAL LOCAL PROGRAMS WITHIN THE 1866 BOUNDARIES

According to the 2017 State of Oklahoma Comprehensive annual financial report, tax income accounts for 46.3% of the total state revenue.[8] The uncertainty and disruption brought into the current state tax system would have a significant effect on Oklahoma residents and local governments. It is unclear how, if at all, the state and local governments would collect taxes in "Indian Country".

The Indian Sovereignty doctrine recognizes Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 657 (1975). In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, this Court held that "absent explicit congressional direction to the contrary, it must be presumed that a state does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." 508 U.S. 114, 113 (1993). *See also McClanahan*, 411 U.S. at 178-79. Oklahoma state

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[8] OFFICE OF MANAGEMENT AND ENTERPRISE SERVICES, OKLAHOMA 2017: COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2017 (2017), https://ok.gov/OSF/documents/cafr2017.pdf.

and local governments could lose the authority to impose income tax, sales tax, motor vehicle tax, and registration fees over any tribal member in the impacted area. Even if the state and local governments are not completely stripped of their ability to collect taxes, affirming the area as "Indian Country" would create a complicated patchwork system where local businesses may be subject to overlapping taxation.

In circumstances involving the state and local taxation authority over non-Native Americans in "Indian Country", there is yet another balancing test to apply. In such cases, courts are to examine the language of the relevant federal treaties and statutes "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 136, 142-45 (1980). In fact, this Court has repeatedly recognized that taxation of non-Native American transactions in "Indian Country" that significantly involve the tribe or its members is "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law." *Washington*, 447 U.S. 134 at 152 (1980). On the flip side, Congress has similarly recognized that a tribe's power to tax even non-Native Americans is a necessary aspect of their self-government and territorial control. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982). If the boundaries from the decision below are affirmed, Oklahoma could lose a substantial portion of its authority to tax its residents, and therefore a large

portion of the revenue it requires to perform essential governmental functions for its citizens.

A. PUBLIC EDUCATION MAY BE DISRUPTED, CREATING LONG TERM DEFICIENCIES IN STUDENT EDUCATION AND DEVELOPMENT

Upholding the Tenth Circuit's decision could devastate the already struggling education system in Oklahoma. Education accounts for over 20% of the state's total annual expenditures and half of all agency appropriations.[9] However, teachers all over the state have participated in walkouts to advocate for better public school funding, claiming that a significant decrease in spending per student is the direct result of a decade of deep tax and public-service cuts.[10] To address this problem, the Oklahoma legislature passed a series of bills in early 2018 to provide funding increases.[11] These initiatives are funded primarily by tax increases, some of which are collected at the local

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[9] *What Are the Biggest State Government Programs? State Spending For Oklahoma – FY 2018*, https://www.usgovernmentspending.com/oklahoma_state_spending_pie_chart (last visited July 27, 2018).

[10] Dana Goldstein, Elizabeth Dias, *Oklahoma Teachers End Walkout After Wining Raises and Additional Funding*, (April 12, 2018), https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html.

[11] Michael Leachman, Kathleen Masterson, Eric Figueroa, *A Punishing Decade for School Funding*, Center on Budget and Policy Priorities (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding.

level, and are a crucial step towards addressing urgent deficiencies in education.

Upholding the decision below and affirming the 1866 Creek Nation boundaries as "Indian Country" could potentially deprive Oklahoma of a significant source of revenue generated by taxation which would directly impact the education system throughout the state. Within the 1866 boundaries of the Creek Nation alone, there are nearly 200,000 students enrolled in the public school system, and research has shown that decreases in education funding have long-lasting negative effects on the welfare of children in public schools.[12] Moreover, recognition of the 1866 territorial boundaries of the Creek Nation and deprivation of state and local tax jurisdiction may significantly disrupt the tax reform that the Oklahoma legislature recently passed, thereby undermining the state's legislative prerogatives. Without the ability to generate enough revenue through taxation, Oklahoma may be left no means to address the urgent problem in education.

B. LOCAL GOVERNMENT MAY LACK THE FUNDING AND AUTHORITY TO ADMINISTER LOCAL HEALTH PROGRAMS AND SERVICES

Local governments provide necessary services that are not provided by the state or federal government to citizens largely funded by taxes

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[12] *Id.*

collected at the local level. Local governments are uniquely positioned and best suited to meet specific needs of their communities. Programs funded through local sales and property taxes provide resources that would not exist without the support from local taxes or local employees and officials. Without the ability to collect these taxes many necessary services would be at risk. All of these initiatives would be detrimentally impacted, if not completely erased, under the 1866 boundaries.

For example, Tulsa County maintains an extensive array of programs for its residents via the Tulsa Health Department. The Tulsa Health Department operates as the "primary public health agency to more than 600,000 Tulsa County residents, including [thirteen] municipalities and four unincorporated areas."[13] Although the agency is an "autonomous health department...with statutory public health jurisdiction throughout Tulsa County and the City of Tulsa," the department's public health benefits could be at risk primarily due to funding concerns. Beyond funding, it is unclear how local government would function under the 1866 boundaries and these programs may also at be risk due to authority and management concerns.

These programs are uniquely situated to apply local expertise and resources to solve local problems. For instance, Oklahoma has an infant mortality rate

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[13] TULSA HEALTH DEPARTMENT, MISSION & VALUES (2018). http://www.tulsa-health.org/about-us/mission-values.

which is higher than the national average, and the Tulsa Fetal and Infant Mortality Review Program studies data from the local population to execute preventive measures working to reduce infant mortality rate. Child Guidance, a statewide program administered by the Tulsa Health Department, promotes healthy child development by offering resources regarding medical screenings, immunizations, and treatment to parents.[14] The School Health program, recognized as a national model practice by other school health officials, helps school-aged children learn good habits to improve future health and lifestyles, addressing issues like childhood obesity or good decision-making.[15] Other focus areas of the department's programs include substance abuse prevention, teen pregnancy prevention, education, and making resources available on topics relating to food safety, personal, family, community, and environmental health. And, most fundamentally, the department operates over ten clinics around the county in order to make health and well-being more accessible to Tulsa county residents.

These programs are examples of how a local government is specifically working to address pressing issues affecting the community. Hundreds of thousands of residents rely on these services and may

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[14] *See* Tulsa Health Department, *Child Guidance*, http://www.tulsa-health.org/personal-health/child-guidance

[15] *See* Tulsa Health Department, *School Health*, http://www.tulsa-health.org/community-health/school-health.

not be able to continue to do so if local health departments lose a major source of funding – state and local tax revenues. [16]

IV. DRUG, MENTAL HEALTH, AND VETERANS SPECIALTY COURTS COULD BE DISCONTINUED AS FUNDING AND AUTHORITY WILL BE ENDANGERED.

As another example of a vital local government agency, the Tulsa Community Service Council runs the county's specialty courts system, which serves as a court-supervised treatment alternative to incarceration.[17] Tulsa's system is by far the largest, but not the only, system of its kind operating in Oklahoma. The system includes a drug court, DUI court, mental health court, and veteran's treatment court. Out of the seventy-seven counties in Oklahoma, there are similar specialty drug courts in seventy-three, including all but one of the counties in the impacted area, and mental health courts in fourteen counties, twelve of which are in the impacted area.[18]

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[16] Standfield & O'Dell, Tulsa County Health Department Financial Statements and Internal Control and Compliance Report, (November 20, 2015), https://www.sai.ok.gov/olps/uploads/2015_tulsa_citycounty_health_department_single_audit_financial_statements_2hsa.pdf.

[17] ***Tulsa Alternative Courts***, Community Service Council., https://csctulsa.org/tulsa-county-courts-program (last visited July 17, 2018).

[18] ***Adult Drug Court***, Oklahoma Department of Mental Health and Substance Abuse Services, https://www.ok.gov/odmhsas/

Locally-organized alternative treatment courts such as these transform local communities for the better by rehabilitating past offenders into productive citizens and reducing the burden on taxpayer-financed incarceration programs, saving over $19,000 per offender per year.[19] In Tulsa County alone, over 1,300 offenders have participated in the program.

While specialty court programs receive a small amount of funding from local governments and would also be at risk if taxation authority becomes ambiguous, these courts are further at risk because there is no Article III equivalent to such innovative local solutions. Local governments are able to channel offenders to specialty courts because they maintain criminal jurisdiction to prosecute crimes. If the decision below is affirmed, and the impacted area is deemed to be "Indian Country" under federal jurisdiction, the survival of all alternative courts within the 1866 boundaries may be at risk due not only to financial concerns, but also because the courts may lack the jurisdictional authority to function.

Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Adult_Drug_Court (last visited July 17, 2018). ***Mental Health Court***, Oklahoma Department of Mental Health and Substance Abuse Services, https://www.ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Mental_Health_Court (last visited July 17, 2018).

[19] ***Tulsa Alternative Courts***, Community Service Council., https://csctulsa.org/tulsa-county-courts-program (last visited July 17, 2018).

V. MUNICIPALITIES MAY BE PREVENTED FROM ENFORCING LOCAL ZONING LAWS WHICH COULD LEAVE MANY HEALTH AND SAFETY ORDINANCES UNENFORCED.

Zoning is a primary tool for local governments to maintain the health, safety, and welfare of its citizens. This Court has recognized the importance of zoning to communities, "Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually-or more often unilaterally-destructive." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Stevens, J., announcing the judgment of the Court in part, dissenting in part). The Tulsa Metropolitan Area Planning Commission promulgated hundreds of pages of regulations which are aimed at promoting the safety of the community and improving the lives of the citizens. It is unclear if and how local governments could enforce zoning laws and ordinances in "Indian Country."

As an initial matter, if the area within the 1866 boundaries is determined to be "Indian Country," that determination could oust state and local governments of jurisdiction, including zoning jurisdiction. Moreover, as to the non-Native Americans living on lands within "Indian Country", the Court confirmed in *Montana v. United States* that tribes retain inherent sovereign power to exercise some forms of civil

jurisdiction over non-Native Americans within reservation boundaries.

In *Brendale*, Justice Stevens, joined by Justice O'Connor, for the Court denied that a tribe has absolute authority to enforce zoning as to non-Native American-owned fee land (i.e., land allotted to Native Americans in fee simple and sold to non-Native Americans), the Court did recognize that there are two "exceptions" noted by *Montana* to this general principle. First, a tribe may regulate activities of non-Native Americans who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. *Montana*, 450 U.S. 544 at 566. Second, a tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Under those exceptions, in a highly divided opinion, this Court found that a tribe had authority to zone fee land in a closed area of a reservation, but not in a more open area that was owned in significant part by non-Native Americans. *Brendale*, 492 U.S. 408, 433 (Stevens, J., announcing the judgment of the Court in part, dissenting in part).

Therefore, under *Brendale*, if the disputed area is determined to be "Indian Country", a tribe may attempt to enact and enforce new zoning ordinances within at least some parts of this area, rendering it subject to a balancing test with different outcomes

depending on the nature and purpose of the zoning law at issue and the character of the land. Indeed, the split decision in *Brendale* illustrates the difficulty that courts will have in determining the applicability of zoning laws to non-Native Americans who own land in "Indian Country".

Adding to this difficulty, under the current "checkerboard zoning" scheme, Oklahoman local governments already must manage intermittent enforcement throughout communities as isolated land plots are exempt from state and local regulation due to their status as "Indian Country".[20] This alone creates tension and problems. If the 1866 boundaries are restored, rendering a large swath of Oklahoma "Indian Country", the question of whose zoning ordinance applies within this area might very well depend on the identity of the property owner, rather than simply on the location of the property, undermining the very purpose of the zoning.

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[20] "Checkerboard zoning" occurs as a result of "checkerboard lands" where tribal trust allotments are spread among parcels owned by non-Native Americans in fee simple. Checkerboard zoning occurs when local zoning regulations apply to the lots owned by non-Native Americans, but those regulations do not apply to adjacent properties because which are lands held in tribal trust and treated as "Indian Country". *See* Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 Ind. L. Rev. 1291 (2001). *See also* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 56 (1995).

The Tulsa Zoning Code provides detailed rules and regulations which prevent the potentially hazardous overlaps of industrial districts and residential districts. This is particularly important in the greater Tulsa area, as the energy industry maintains many industrial sites such as oil and gas wells. The Code also details regulations which govern waste storage and removal, proper safety requirements for maintaining both indoor and outdoor gun ranges, providing safe and available parking for residential and commercial districts, and the appropriate placement of liquor stores and sexually oriented businesses. Tulsa enforces these regulations through a series of penal actions beginning with fines and culminating in abatement and other court-enforced remedies.[21]

While it is unclear what would happen to these regulations if the Tenth Circuit's decision was upheld, it is clear is that the enforcement mechanism used by local governments to enforce zoning codes and other regulations would at a minimum be disrupted. If local governments were made incapable, overnight, of enforcing the rules and regulations that maintain order in their communities, communities would be greatly harmed. Even if all zoning regulation would not disappear, the ability for the local governments to enforce its zoning ordinances will at a minimum be

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[21] CITY OF TULSA, OKLA., MUN CODE (2016) http://www.incog.org/Land_Development/Documents/Tulsa%20Zoning%20Code%206.30.17%20Updates%20with%20bookmarks.pdf.

questioned through potentially long and cumbersome litigation in federal courts.

CONCLUSION

Upholding the Tenth Circuit's decision may rob Oklahomans of access to the most fundamental source of resources and governance by seriously impairing the ability of local governments to function. For the foregoing reasons, the judgment below should be overturned.

Respectfully submitted,

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Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR *AMICUS CURIAE* MUSCOGEE (CREEK) NATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Muscogee (Creek) Nation ("Nation" or "Creek Nation") is the fourth most populous Indian nation in the United States.[1] Thousands of Creek citizens reside within the boundaries of the Reservation that has been the Creek homeland for nearly two centuries. Today, the Nation provides significant governmental services to its citizens and noncitizens throughout the Reservation.

The Nation had no involvement in the genesis of this litigation but now finds its Reservation under direct attack. Petitioner claims that the Nation never enjoyed a Reservation in the Indian Territory, and that, even if it did, some indeterminate combination of allotment and statehood abolished it – all despite clear treaty and statutory text to the contrary. Moreover, Petitioner suggests that continued recognition of the Reservation will render Oklahoma a second-class state.

These litigation claims turn text and history on their heads and ignore the reality of daily, on-the-ground cooperation between the Nation and neighboring governments. As it did in the Tenth Circuit, the Nation files this brief, and an accompanying motion for divided argument time, in order to vindicate its core sovereign interests in the survival of its treaty-guaranteed Reservation.

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[1] No counsel for any party authored this brief in whole or in part. No one other than amicus curiae made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), unanimously distilled core principles of statutory construction and federal Indian law as they pertain to reservation diminishment, it is at best a bit player in Petitioner's briefing. In the face of *Parker's* edict that, "[a]s with any other question of statutory interpretation," legislative text is "the most probative evidence" of congressional intent to alter reservation boundaries, *id.* at 1079 (internal quotation marks omitted), Petitioner conjures a narrative featuring an inexorable march toward the destruction of the Nation's Reservation at statehood. That narrative is admittedly well-crafted. But it fails to grapple with critical text that – at each significant juncture – squarely contradicts it. As such, Petitioner's reimagined history devolves into a work of fiction.

Instead of text, Petitioner relies on inference. Because Congress curtailed various Nation powers, the story goes, it must have eliminated the Nation's governmental authority, and with it the Nation's Reservation, entirely. But just as this Court has elsewhere required a clear statement of congressional intent to dispossess core sovereign prerogatives, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014), it is "an enduring principle of Indian law ... [that] courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). In *Bay Mills*, this Court accordingly declined to infer from Congress's abrogation of certain tribal powers the

intent to abrogate others. "This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that ... Congress must have intended something broader. And still less do we have that warrant when the consequence would be to expand an abrogation of [tribal power]." *Id.* at 2034 (internal quotation marks and citation omitted).

Here, the case against inference is even stronger. Congress used express language to eliminate certain Nation powers. It had such language at its disposal to disestablish the Nation's Reservation, but chose not to use it, and instead twice reaffirmed the Nation's territorial jurisdiction. That should be the end of the matter.

Petitioner seeks to avoid this conclusion by resorting to the work of popular historians, and that reliance is telling. One of his key sources contrasts the "masterful personalities" of white Oklahomans with the "weaker characters" of the Indians, whose "barbarism" and "ignorance" afflicted the Indian Territory until "the superior race rushed in to occupy and assimilate and create a state that is magnificent in its wealth and activities." Luther B. Hill, *A History of the State of Oklahoma* 3-4 (1910).[2] Petitioner's resort to a work of such rank hagiography and bias should tell this Court all it needs to know about the "mountain of historical scholarship," Br. 26, on which Petitioner's narrative rests. *See also, e.g.*, Roy Gittinger, *The Formation of the State of Oklahoma* 257 (1939) (cited repeatedly and stating that "Oklahoma has more Indian citizens than any other

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[2] *Available at* http://bit.ly/MCN-Hill-History.

state ... [and] many negroes, with the resulting negro problem"). Petitioner's "mountain" is nothing more than an infested molehill.

This brief focuses on three critical periods in the Nation's history – reservation creation, allotment, and statehood – and demonstrates how, for each period, treaty and statutory text defeat Petitioner's claims. It then discusses the Nation's present-day provision of governmental services that benefit Nation citizens and noncitizens, as well as the congressional and judicial restrictions on the Nation's authority to regulate non-Indians on Reservation fee lands. Affirmance of the thorough, text-based decision below will result in none of the deleterious consequences advanced by Petitioner and his amici, but instead will allow the Nation to continue its vital role in bettering the quality of life throughout the Reservation.

ARGUMENT

I. THE CREEK NATION'S TREATY-PROTECTED RESERVATION HAS NEVER BEEN DISESTABLISHED.

A. The United States and the Creek Nation Established a Reservation by Treaty.

Petitioner first argues that the Nation's lands were never a "reservation" because the Nation held them under a fee patent. Br. 23-25. With this, Petitioner seeks to escape the "governing principle" that "[o]nce a block of land is set aside for an Indian reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465

U.S. 463, 470 (1984) (emphasis added) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Indeed, he seeks to raze this pillar entirely, claiming that he need only overcome "any presumption that Congress preserved the Creek land patents," Br. 32, rather than "[t]he presumption that Congress did not intend to diminish the reservation," *Solem*, 465 U.S. at 481.

Petitioner had good reason for not raising this argument below.[3] "'[R]eservation' .... is used in the land law to describe any body of land ... reserved from sale for any purpose. It may be a military reservation, or an Indian reservation[.]" *Celestine*, 215 U.S. at 285. Reservations, then, are not restricted to those lands where, in Petitioner's *ipse dixit*, Indians have only a right of occupancy, but rather include any blocks reserved from sale or other disposition for purposes within Congress's authority. The Creek Reservation unquestionably meets this definition.

Pursuant to the Indian Removal Act of 1830, §§ 1, 3, 4 Stat. 411, 412, the Treaty of 1832 "solemnly guarantied" lands "west of the Mississippi" to the Nation. Treaty with the Creeks, art. XIV, March 24, 1832, 7 Stat. 366, 368. The Treaty of 1833 then "establish[ed] boundary lines which will secure a ... permanent home to the whole Creek Nation," and did so in precise geographic terms. Treaty with the Creeks, Preamble, arts. II, VII, Feb. 14, 1833, 7 Stat. 417, 417-20. This is fatal to Petitioner's claims that the Nation's boundaries were "established" and "delineated" by land patents. Br. 24-25. And

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[3] *See, e.g.*, Okl. 10th Cir. Br. 75 n.25 ("the reservation was intact in 1900").

contrary to the United States' naked assertion, U.S. Br. 8, 24, these lands were in the public domain when reserved for the Creeks – they had been ceded to the United States in treaties with the Quapaw, 7 Stat. 176 (1818), and the Osage, 7 Stat. 183 (1818). *See Mo., Kan. & Tex. Ry. Co. v. United States*, 47 Ct. Cl. 59, 119 (1911) (Howry, J., concurring) ("these lands were reserved ... from the public lands"), *aff'd*, 235 U.S. 37 (1914). The 1833 Treaty thus ordained a reservation in the classic sense.[4]

Under the Removal Act, tribes could also receive a patent for their new lands "if they prefer it[.]" § 3, 4 Stat. 412. Accordingly, the 1833 Treaty authorized a patent, at the Nation's election, for the land "assigned ... by this treaty[.]" Art. III, 7 Stat. 419. The Creeks occupied their Reservation for years before a patent issued in 1852, which simply reproduced the 1833 boundaries verbatim. Fee Patent, Aug. 11, 1852, Land Title Plant, Muscogee Creek Nation, Book 1:748. *See Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 119 (Howry, J., concurring) ("The patents rested on treaties[.]").

In the Treaty with Creeks and Seminoles, Aug. 7, 1856, 11 Stat. 699, the Nation made a small cession of land, with the modified boundaries described by reference to both the Treaties of 1832 and 1833 and the patent. Arts. I, III, 11 Stat. 699-700. The Nation then ceded the western half of its Reservation in the Treaty of 1866, which does not reference the patent

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[4] The United States previously urged this Court that the 1833 Treaty established a "reservation" for the Creeks. Brief for United States as Amicus Curiae at 11, *Okla. Tax Comm'n v. Muscogee (Creek) Nation*, No. 87-1068 (1987).

at all. Treaty with the Creek Indians, art. III, June 14, 1866, 14 Stat. 785, 786. The eastern half remained reserved from sale and "forever set apart as a home for said Creek Nation," with a guarantee of "quiet possession." Arts. I, III, 14 Stat. 786. These again are the hallmarks of a "legally constituted Indian reservation." *United States v. Dion*, 476 U.S. 734, 737 (1986); *Celestine*, 215 U.S. at 285.

Indeed, the Treaty of 1866 refers to the retained portion as the "reduced Creek reservation." Art. IX, 14 Stat. 788. That was no slip of the pen. The 1866 Cherokee treaty twice refers to lands bounded by "the Creek reservation." Treaty with the Cherokee Indians, art. IV, July 19, 1866, 14 Stat. 799, 800. In 1873, Congress sought a cession from the Creeks "of a Portion of their Reservation." Act of March 3, 1873, ch. 322, 17 Stat. 626 (referring to "limits of the Creek reservation" and distinguishing "Creek ceded lands from the Creek reservation"). Petitioner points to the word "reservation" when used to describe other tribes' lands as probative of congressional intent, *see* Br. 23-24 n.6, but dismisses these repeated references to the Creek "reservation" as "meaningless when all vestiges of reservation status were destroyed upon statehood," *id.* at 33. This is circular reasoning in the extreme.

Petitioner's argument contradicts not only text but logic. "[I]t would be anomalous" to hold that "title *stronger* than the right of occupancy" would leave Creek lands "with *less* protection." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975-76 (10th Cir. 1987). It also ignores history, including President Jackson's defiance of Chief Justice Marshall's decision in *Worcester v. Georgia*, 31 U.S.

515 (1832), leading to the Nation's loss of its eastern lands and its forced removal west. *See* Resp. Br. 6. It is not surprising that the Nation thereafter opted for a patent as an *additional* layer of protection.

Petitioner now seeks to wield this election as a sword against the Nation. Br. 25. He would have the Nation's Reservation status turn on changes in title (on a "parcel by parcel" basis, no less, *id.* at 27). This Court has repeatedly rejected such an approach, *Solem*, 465 U.S. at 470; *Celestine*, 215 U.S. at 285, and should do so again here.

B. Congress Allotted the Creek Reservation to Fulfill the Treaty Purposes.

Changing conditions eventually caused Congress to consider allotment and cession of Creek lands. *Woodward v. De Graffenried*, 238 U.S. 284, 294-95 (1915). In Petitioner's telling, Congress created the Dawes Commission "with the singular purpose of breaking apart the Five Tribes" to enable statehood. Br. 26. But the 1893 statute creating the Commission simply directed it to negotiate with the Five Tribes

> to procure, first, such allotment of lands in severalty ... and, secondly, to procure the cession, for such price ... of any lands not found necessary to be so allotted ... to the United States .... But said commissioners shall, however, have power to negotiate any and all such agreements ... to enable the ultimate creation of a Territory of the United States with a view of the admission of the same as a state in the Union.

Act of March 3, 1893, ch. 209, § 16, 27 Stat. 612, 646.

Nothing here or elsewhere in the statute remotely suggests that Congress viewed eradicating the reservations as essential to statehood. In the Commission debate, Senator Perkins (an ardent statehood proponent) observed that "these reservations" have been "guaranteed to them by treaty stipulations" and saw no reason "why the ... treaties ... might not be respected and protected" consistent with statehood. 24 Cong. Rec. 259, 268 (1892).

From the outset, the Creeks "would not ... agree to cede any portion of their lands to the Government," so the Commission "abandoned all idea of purchasing any of it" and instead proposed "an equal division of all their lands" through allotment. S. Misc. Doc. No. 53-24 ("Dawes Rep."), at 7 (1894). While Petitioner's historian identifies "the ignorance ... of the Indian race" as a key obstacle faced by the Commission, Hill at 328, the Commission's account portrays the Creeks as astute negotiators determined to retain control of their lands, Dawes Rep. at 2, 7.

Congress agreed to the allotment proposal, and did so to preserve, not terminate, the treaty promises. In *Woodward*, this Court undertook the most comprehensive consideration of the legislative history of Indian Territory allotment by any federal court before or since to determine "the situation" Congress sought to "'remedy'" through allotment. 238 U.S. at 293. In short, land monopolies had emerged on the reservations, by which "[a] few enterprising [tribal] citizens" had gained control "of the best and greatest part of these lands[.]" *Id.* at 299

n.1 (internal quotation marks omitted). This violated "the principle of the treaties," which guaranteed the reservations "for the equal benefit of the citizens," *id.* at 297, and it was this principle that allotment sought to honor.

Nowhere in its extensive examination of Congress's intent did this Court suggest that allotment was aimed at abrogating the treaties as a prerequisite to statehood. To the contrary, the "manifest purpose" of allotment was "to administer the use of lands ... *according to the true intent and meaning of the early treaties*[.]" *Id.* at 306 (emphasis added).

C. The Creek Allotment Act Expressly Preserved the Nation's Legislative Authority over Its Reservation.

The Creek Nation agreed to the Allotment Act of March 1, 1901, ch. 676, 31 Stat. 861. By then, as Petitioner stresses, Congress had imposed significant restrictions on the Nation's government, including abolishing its courts. Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-05. However, the Allotment Act expressly preserved the Nation's legislative jurisdiction over its Reservation, as this Court and the Eighth Circuit soon confirmed.

Consistent with the congressional objectives canvassed in *Woodward*, the Act provided for allotment "among the citizens of the tribe ... so as to give each an equal share of the whole in value." § 3, 31 Stat. 862. Lands were reserved for tribal purposes including schools, cemeteries, and churches. § 24, 31 Stat. 868-69.

Notably, lands were also reserved for townsites, § 24(a), 31 Stat. 868, where thousands of non-Indians had built improvements on lands they did not own. *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916). "All towns in the Creek Nation" of 200 or more residents were to be platted to facilitate their "growth." § 10, 31 Stat. 864. Lots could be purchased in fee by noncitizens with proceeds going to the Nation. §§ 11-14, 23, 31, 31 Stat. 866, 868, 870. These "*surplus lands* were disposed of with a view to continuing existing Indian towns and encouraging their enlargement." *Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 82 (emphasis added).

Indian towns on the Reservation included Tulsa, founded by the Creeks in 1836 and named in memory of the centuries-old settlement set ablaze by non-Indians as the Creeks were removed from Alabama – its embers carried on the Trail of Tears and planted below a great oak that still stands in the city today. Angie Debo, *TULSA: from Creek Town to Oil Capital* 3, 8-15 (1943). "Tulsa was platted ... as a townsite on lands of the Creek Nation under the provisions of the [1901 Act]," *Tulsa v. Sw. Bell Tel. Co.*, 75 F.2d 343, 347 (10th Cir. 1935), with the first deeds issued in 1902, H.R. Rep. No. 57-5, at 187, 193, 226 (1902) – the year "valuable oil deposits" were discovered there, *id.* at 180. Such townsite provisions were a common means of allowing non-Indians to settle "within an Indian reservation." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358-59 (1962).

While making these significant adjustments to land ownership, Congress preserved the Nation's

legislative jurisdiction over the entire Reservation. Section 42 provided:

> No act, ordinance, or resolution of the ... Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof ... shall be of any validity until approved by the President of the United States.... [I]f approved ... it shall be published in at least two newspapers having a bona fide circulation in the Creek Nation.

§ 42, 31 Stat. 872. This textual acknowledgement of the Nation's continuing authority over the lands both "of the tribe" and "of individuals after allotment" is irreconcilable with Petitioner's claim that "[o]nce Congress allotted the land," the reservation "disappeared[.]" Br. 27. The requirement that notice of new laws be published "in the Creek Nation" underscores that conclusion.

Petitioner nowhere even *acknowledges* section 42. The United States acknowledges but has no answer for it, noting only that it "substantially diminished" the Nation's authority by subjecting its laws to federal oversight. U.S. Br. 13. But such oversight is a staple of federal-tribal relations. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 327 (1978); 25 U.S.C. § 5123(a).

Thus, while Petitioner contends that allotment "evaporated" the Reservation, Br. 27, the Allotment Act contains no text to that effect and clear text to the contrary. Congress had previously applied termination language to other Creek lands. *See*

Resp. Br. 7. It did so in contemporaneous allotment statutes as well. *See, e.g.*, Act of April 21, 1904, ch. 1402, § 8, 33 Stat. 189, 217-18 (allotting Ponca and Otoe reservations in Oklahoma Territory, and providing "*further*, That the reservation lines of the said ... reservations ... are hereby, abolished"). *See Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973) (citing Ponca/Otoe provision for proposition that "Congress has used clear language of express termination when that result is desired"). Petitioner's conclusory rhetoric cannot obscure the careful textual distinctions thus drawn by Congress in its treatment of different reservations.

Nor did Congress's divestment of the Nation's *adjudicative* jurisdiction undermine section 42's preservation of its *legislative* jurisdiction. "[L]egislative jurisdiction .... is quite a separate matter from jurisdiction to adjudicate." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (internal quotation marks and citations omitted); *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001) (discussing distinction). Indeed, Congress enacted section 42 while acknowledging *in the same statute* that it had already abolished the Nation's courts. § 47, 31 Stat. 873.

In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Chickasaw Nation, under a provision materially identical to section 42, had enacted legislation regulating noncitizen activities within its reservation that the Secretary was enforcing. *See id.* at 391 & n.1. The *Hitchcock* plaintiffs challenged the Chickasaw's jurisdiction, arguing, as does Petitioner, that "whatever powers the Indian governments formerly had," they have "little of sovereign character

to them," including "no judicial system[.]" *Morris v. Hitchcock*, 21 App. D.C. 565, 576 (D.C. Ct. App. 1903) (reproducing arguments).

The Circuit rejected the challenge and this Court affirmed, stating that Congress intended "to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of[.]" 194 U.S. at 393. In doing so, this Court recognized that tribal jurisdiction continued even where a noncitizen "was the absolute owner of the land[.]" *Id.* at 392 (discussing 23 Op. Att'y Gen. 528, 530 (1901)).

The following year, in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Eighth Circuit applied *Hitchcock* to the Creek Nation, which had likewise enacted legislation imposing conditions on noncitizen townsite owners "for the privilege ... of trading within its borders.... Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place[d] beyond debate" the Nation's authority to enact such legislation. *Id.* at 949 (citing *Hitchcock*, 194 U.S. at 392). That authority "remained in full force and effect after ... the agreement of 1901" and was not diminished by "the establishment of town sites nor the purchase ... by noncitizens of lots therein[.]" *Id.* at 953-54.

These conclusions followed because, while Congress had significantly curtailed the Nation's powers, "every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress[.]" *Id.* at 950. This Court continues to hew to this fundamental principle today. *See Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("unless

... Congress withdraws a tribal power," a tribe "retains that authority in its earliest form"); *Bay Mills*, 134 S. Ct. at 2030.[5]

Buster and *Hitchcock* evidence a widespread contemporaneous understanding – including on the part of the judiciary, the President (who had approved the laws), the Secretary, and the Attorney General – that the Creek Allotment Act means what it says: the Nation's legislative authority over the Reservation continued "after allotment." These cases were the backdrop against which Congress enacted legislation in 1906 continuing that authority indefinitely.

D. Congress Deliberately Preserved the Creek Nation and Its Reservation.

The Creek Allotment Act provided for the dissolution of the Creek government by March 4, 1906, subject to "further legislation[.]" § 46, 31 Stat. 872. After first extending "the tribal government" through a Joint Resolution, S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906), Congress enacted the Five Tribes Act ("FTA"), section 28 of which provided:

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[5] *Buster* cannot today be cited for the proposition that tribal jurisdiction over nonmembers is absolute, as this Court has since recognized limitations on that jurisdiction. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981). But *Buster* continues to be cited by this Court, which has never questioned *Buster*'s holding that the Allotment Act sustained the Nation's legislative jurisdiction over non-member activities within its Reservation. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008) (noting that *Buster* upheld Creek Nation's power to tax "nonmembers for the privilege of doing business within the reservation").

> That the tribal existence and present tribal governments of the [Five Tribes] are hereby continued *in full force and effect for all purposes authorized by law*, until otherwise provided by law...: *Provided*, That no act, ordinance, or resolution ... of the ... legislature of any of said tribes ... shall be of any validity until approved by the President[.]

Act of April 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 (first emphasis added).

Petitioner argues that Congress preserved the Creek government "due to practical administrative concerns," principally the need to continue executing deeds. Br. 19. But this again ignores Congress's words – maintaining governmental authority "in full force and effect for all purposes authorized by law" would have been overkill, to say the least, if the execution of deeds had been Congress's sole end. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 303 (1911) (referring to the "right of legislation" preserved by section 28). And while Petitioner notes that the Act further curtailed the Nation's powers, including its taxing authority, Br. 13, the territorial jurisdiction preserved by section 42 of the Allotment Act and vindicated in *Hitchcock* and *Buster* extended beyond taxation. Even absent section 28's affirmative declaration of continuing authority, Congress's decision to eliminate one aspect of that jurisdiction would provide "no roving license" to find it abolished altogether. *Bay Mills*, 134 S. Ct. at 2034.

Indeed, if one is to go beyond text, the legislative history of section 28 confirms that Congress acted

specifically to preserve the Reservation. By treaty, the Creek held the Reservation "so long as they shall exist as a nation, and continue to occupy the country hereby assigned," art. III, 7 Stat. 419, with the "reversionary interest" in the United States, Pet. App. 84a n.49. Congress carefully considered this circumstance in early 1906 because of its implications for massive railroad grants in the Indian Territory. In 1866, Congress had conditionally granted to two railroads millions of acres in the Creek and other Five Tribes' reservations. *See Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 85-89 (Howry, J., concurring). The grants would take effect "whenever the Indian title shall be extinguished," and "said lands become a part of the public lands of the United States." Act of July 25, 1866, ch. 241, § 9, 14 Stat. 236, 238; Act of July 26, 1866, ch. 270, § 9, 14 Stat. 289, 291.

The grants, in other words, would take effect *upon disestablishment*. *See Parker*, 136 S. Ct. at 1079 (disestablishment occurs by "extinguish[ing] the land's prior use ... as an Indian reservation – and ... return[ing] it to the United States"). Congress, which was on notice that the railroads viewed both allotted and unallotted lands as falling within the grants, 40 Cong. Rec. 3189, 3222 (1906) (Rep. Curtis), focused squarely on this point in its deliberations over section 28, and continued the Creek government with the specific intent to avoid that result:

> This land ... has been granted by the Government ... to those tribes ... so long as the Indians exist as a tribe.... Any Senator can see that the moment the tribal relation terminates the tribal interest in the property ceases, and it must necessarily revert to ...

> the United States.... The railway grant contains a provision that it should take effect on condition that the land became public land of the United States.

40 Cong. Rec. 2959, 2976 (1906) (Sen. McCumber); *see also, e.g.*, 40 Cong. Rec. 3034, 3053 (1906) (Sen. Aldrich); *id.* at 3064 (Sen. McCumber).

Congress understood that the rights at issue existed "by virtue of treaties," *id.* at 3054 (Sen. Culberson), that "[i]t is the sovereignty that holds this title," 40 Cong. Rec. at 2975 (Sen. Teller), and that the land "was granted to the tribe only so long as it occupied it as a tribe," 40 Cong. Rec. at 3055 (Sen. McCumber). Section 28 was hence necessary to preserve the "lapse of title which would result in the lands becoming public lands[.]" 40 Cong. Rec. at 2977 (Sen. Heyburn). *See also* 40 Cong. Rec. at 3061 (Sen. Teller) ("[T]he wisest thing for us to do would be to extend [the tribal governments] indefinitely.").

Congress fully understood, furthermore, that in averting disestablishment, it was averting the transfer of lands to state jurisdiction:

> I hope we ... [can] get the bill [with section 28] through, so that we may protect the Indians ... because ... the moment the tribe ceases to exist as a tribe ... we have no further control over the property of those Indians. *They will then be controlled by the new State.*

40 Cong. Rec. at 2977 (Sen. McCumber) (emphasis added). The Senators in fact deliberately suspended action on the pending statehood bill to first ensure that the lands would "be safeguarded for all time to

the Indians and their descendants.... It is vastly more important that *the statehood bill should wait* ... than that this bill should be in the slightest degree jeoparded." 40 Cong. Rec. at 3052 (Sen. Spooner) (emphasis added).

This Court has unanimously held that for Congress to abrogate a treaty right, "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40. Here, the opposite occurred. Congress carefully considered a potential conflict with Creek treaty rights and decided *not* to eliminate them.

While Petitioner highlights sovereign Creek rights that Congress explicitly withdrew, when it comes to the Creek Reservation Petitioner can only rely on inference, because Congress in fact decided against disestablishment. "It is not doubted that the United States had power to trample upon its treaty obligations and make the lands of the civilized tribes a part of the public domain ... but there was ... a complete settlement of the question by the action of Congress in continuing the use of these lands according to the spirit of the treaties." *Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 116 (Howry, J., concurring), *aff'd*, 235 U.S. at 40 (Holmes., J.) (holding, in rejecting argument that allotted Creek lands fell within railroad grant, that "a mere change from tribal title was not enough" as the Creek lands had been "forever set apart as a home for the Nation" by treaty).

E. Statehood Did Not Affect the Creek Reservation Boundaries.

Petitioner asserts (quoting not Congress but a booster newspaper) that the "coming of statehood ... obliterate[d]" tribal boundaries. Br. 28. But nothing in the Oklahoma Enabling Act purports to terminate those boundaries. Congress instead – *in the first sentence of the statute* and consistent with its contemporaneous section 28 deliberations – forswore any intent

> to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the ... United States to make any law or regulation respecting such Indians, their lands, property, or other rights ... which it would have been competent to make if this Act had never been passed.

Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267, 267-68. *See also* § 3, 34 Stat. 270 (Oklahoma required to "forever disclaim all right and title ... to all lands ... owned or held by any Indian, tribe, or nation").

A Congress bent on "obliterat[ing]" Indian reservations upon statehood would not have used such language (which again is entirely absent from Petitioner's account). Indeed, this Court had recently interpreted materially identical language in the Kansas enabling act to mean that "[t]he Indians continued thereafter as previously in possession of the lands, and their rights ... were not extinguished *by anything in the act of admission* of the State[.]" *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 120

(1894) (emphasis added). And while Petitioner claims that *Coyle v. Smith*, 221 U.S. 559 (1911), renders Congress's intent to disestablish the reservations "pellucid," Br. 22, *Coyle* instead declares that provisions pertaining "to the control by the United States of large Indian reservations ... of the new State, are found in the Oklahoma enabling act." 221 U.S. at 570. In sum, "Congress was careful to preserve the authority of ... the United States over the Indians, their lands and property, which it had prior to the passage of the [Enabling] act." *Tiger*, 221 U.S. at 309.

And there is more. Within days of the Enabling Act, the same Congress passed the Act of June 21, 1906, ch. 3504, 34 Stat. 325. This statute sought to stem a boundary dispute by "declar[ing]" an 1871 survey line mandated by the Treaty of 1866 "to be *the west boundary line of the Creek Nation*," *id.* 364 (emphasis added), and established a judicial recording district with reference to "the north line of the Creek Nation," *id.* 343. Petitioner shrugs off this textual evidence of an extant Reservation by suggesting that the "boundaries remained relevant for purposes of allotment[.]" Br. 34. But that does not explain why Congress chose the words it did, while referencing other reservations as disestablished *in the same statute*. *See, e.g.*, 34 Stat. 379 (referring to an allotment "in what was formerly the north half of the Colville Indian Reservation"); *id.* 375 ("the former Uintah reservation"). Congress is not as careless with language as Petitioner would have it.

Bereft of a coherent textual argument, Petitioner draws on isolated statements of Pleasant Porter,

who, until his death in 1907, spoke for the "faction" of the Creek membership "resigned" to dissolution, *Harjo v. Kleppe*, 420 F. Supp. 1110, 1131 (D.D.C. 1976), *aff'd*, 581 F.2d 949 (D.C. Cir. 1978), which often put him at odds with the Creek National Council. With section 28, Congress proved Porter wrong, and his predictions regarding dissolution never came to pass. *See Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 718 & n.23 (1943).

Petitioner also relies on the subsequent dispossession of Creek lands. But Respondent well describes the orgy of lawlessness responsible for that dispossession, Resp. Br. 13-15, and Petitioner misapprehends the role of this Court if he thinks that it sits to ratify such actions.

Finally, Petitioner again urges the Court to *infer* disestablishment from Congress's restrictions on tribal self-government, suggesting, for example, that Congress authorized the sale of tribal schools and other property, leaving them with "no schools, no buildings[.]" Br. 22, 28-29 (citing § 15, 34 Stat. 143 ("section 15")). This argument smacks of overreach. Section 15 authorized the Secretary to sell school and other properties only "at such time ... as he may prescribe[.]" 34 Stat. 143. Indeed, just weeks later, Congress authorized "the maintenance, strengthening, and enlarging of the tribal schools," 34 Stat. 340, and it continued to do so well after statehood, *see, e.g.*, Act of March 2, 1917, ch. 146, 39 Stat. 969, 985 (authorizing funding of "improvements" and "new buildings" for tribal schools).

More fundamentally, Congress included a provision in its first Indian appropriations act *after* statehood materially identical to section 15, except that it applied expressly to properties "on lands belonging to the Five Civilized Tribes[.]" Act of April 30, 1908, ch. 153, 35 Stat. 70, 71. Congress's deliberations over that phrase again contravene Petitioner's argument.

Senator Owen of Oklahoma had proposed to amend the phrase to refer to "lands *heretofore* belonging to the *late* Five Civilized tribes." 42 Cong. Rec. 2576, 2584 (1908) (emphasis added). After statehood, he asserted, "the lands embraced in eastern Oklahoma, which formerly might have been called 'reservations' are not reservations," *id.*, and "the word 'late'" is used where a tribe "has lost governmental functions," *id.* at 2592. In support of these claims, Senator Owen advanced the very arguments reprised by Petitioner here. *See id.* at 2591-93, 2595-96.

The response was led by Senator Curtis, principal author of the Curtis Act. Congress had "extend[ed]" the tribal governments in 1906, such that "the Five Civilized Tribes are in existence *as much to-day as they ever were*, except the acts of their legislature must be approved by the President." *Id.* at 2586 (emphasis added). When Senator Owen protested, as Petitioner does, that the tribes were "absorbed by Oklahoma absolutely," Senator Curtis countered that "*[t]he lands have not been absorbed.*" *Id.* (emphasis added). His colleagues agreed, *see, e.g.*, *id.* at 2595 (Sen. McCumber) (federal guardianship continues "[f]or the property which has been granted

them and the protection of that property, yes; absolutely"), and the amendment was defeated.[6]

During the debate over Senator Owen's proposed amendment, it became clear that he was making his arguments with a willing disregard for statutory text:

> Mr. CURTIS. Why put in the word "late?"
>
> Mr. OWEN. Because they are dead.
>
> Mr. CURTIS. The law says they are not.
>
> Mr. OWEN. *The law is mistaken if it says so.*

Id. at 2584 (emphasis added). So too with Petitioner. Congress expressly considered and rejected the argument that the Five Tribes and their lands had evaporated upon statehood, if not before. It instead enacted *text* confirming what it had already made clear in the FTA and the Enabling Act. 35 Stat. at 71. Petitioner returns now, a century later, urging this Court to reach back into that debate and upend it, to accept arguments Congress rejected, and to reject those it accepted as evidenced by the law itself. But while Petitioner may "wish that Congress would have spoken differently," this Court does not exist to "remake history." *Parker*, 136 S. Ct. at 1082 (internal quotation marks omitted); *see also Indian Country*,

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[6] Congress recognized the Nation's continuing authority again in 1909, when it made approval by "the Creek National Council" a "condition precedent" to the operation of federal legislation equalizing the value of Creek allotments throughout the Reservation. Act of March 3, 1909, ch. 263, 35 Stat. 781, 805.

U.S.A., 829 F.2d at 981 ("It is not for the courts to complete a task that Congress chose not to finish.").

II. THE CREEK NATION'S EXERCISE OF GOVERNMENTAL AUTHORITY ON ITS RESERVATION ENHANCES THE QUALITY OF LIFE FOR ALL OKLAHOMANS.

The Creek Nation, like many tribes, suffered significant insults to its authority during the allotment era. However, the "metes and bounds" of tribal sovereignty are Congress's to adjust, *United States v. Lara*, 541 U.S. 193, 202 (2004), and Congress returned in 1936, through the Oklahoma Indian Welfare Act, 25 U.S.C. § 502, to restore to the Nation "all powers associated with [tribal] self-government," including its courts, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988).[7] The Nation has since flourished.

Lacking textual arguments, Petitioner and his amici resort to dire predictions regarding the consequences of an affirmance. But programs administered by Creek governmental agencies – in close cooperation with their State and local counterparts – enhance, rather than detract from, the quality of life for citizens and noncitizens throughout the Reservation. This Court's clear jurisdictional precedents guide this cooperation and guard against the doom portended in the top-side briefing.

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[7] Then-Circuit Judge Ruth Bader Ginsburg joined the *Hodel* opinion.

A. The Nation Provides Critical Services to Indians and Non-Indians Throughout the Reservation.

The Nation is the fourth most populous tribe in the country, with 86,100 citizens.[8] Its 1979 Constitution maintains the tripartite, separation-of-powers government first established in 1867, with a democratically elected Principal and Second Chief and National Council, and an independent judiciary nominated by the executive and confirmed by the legislature.[9] The Nation's government has an annual budget of more than $300 million and employs nearly 2,500 people.[10] It provides for the health, safety, and welfare of persons throughout the Reservation, including non-Indians, ensuring access to quality services that otherwise would not be available, particularly in rural areas. The Nation's economic development entities, ranging from gaming facilities to business support services to farms, employ an additional 2,522 people.[11]

The Nation's critical role in providing essential governmental services to Reservation communities is aptly illustrated by the following program areas: law enforcement, family violence, health care, and education.

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[8] http://bit.ly/creektourism; http://bit.ly/mcncitizenship.

[9] http://bit.ly/creektourism; http://bit.ly/mcnconstitution, arts. IV-VIII.

[10] https://bit.ly/2MjnNad; http://bit.ly/FY-2017-Employment (Government Employment).

[11] http://bit.ly/FY-2017-Employment (Business Employment); http://www.mnbe.com/; http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 18.

Law Enforcement. The Nation's Lighthorse Police Department plays a pivotal role in coordinated law enforcement efforts on the Reservation. It has entered cross-deputization agreements with the United States, the State, and 32 county and municipal jurisdictions, including the City of Tulsa. It is also a member of the FBI Safe Trails Task Force and of violent crime and drug task forces involving multiple county and municipal agencies.[12]

The Department has patrol, investigation, narcotics, hostage, K-9, and lake patrol units. Pursuant to its inter-governmental agreements, it responds to approximately 5,000 criminal and emergency situations throughout the Reservation annually, regardless of the Indian status of those involved.[13] This cooperation has yielded notable success. For example, in recent months a Lighthorse hostage negotiator worked with county law enforcement to prevent a "suicide-by-cop,"[14] and a Lighthorse K-9 unit assisted in apprehending a non-Indian inmate who had escaped from a State facility.[15] And the Okmulgee District Attorney has declared that a complex drug investigation yielding multiple arrests "would not have been possible without the close cooperation and outstanding effort of all of the agencies involved.... Oklahoma Bureau

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[12] http://bit.ly/MCN-Lighthorse; http://bit.ly/drug-task-force; http://bit.ly/indian-county-crime.

[13] http://bit.ly/lighthorse-police; http://bit.ly/Lighthorse-Calls-for-Service; http://bit.ly/lighthorse-patrol.

[14] http://bit.ly/Lighthorse-Negotiation.

[15] http://bit.ly/inmate-capture.

of Narcotics was a major player as well as Creek Nation Lighthorse[.]"[16]

The Nation prosecutes offenders in accordance with the Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(b)-(d), and the Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304, and accordingly affords defendants protections mirroring those of the federal Bill of Rights, including due process and equal protection, assistance of counsel, and in the case of non-Indian defendants, the right to a jury pool including non-Indian community members.[17] Appeals are taken to the Nation's seven-member Supreme Court, the decisions of which are published on the Court's website and in legal databases.[18]

Family Violence. Without regard to tribal citizenship, the Nation's Family Violence Prevention Program (FVPP) provides services throughout the Reservation to victims of domestic violence, sexual assault, and stalking.[19] These services include 24-hour emergency assistance and crisis intervention, Sexual Assault Nurse Examiners providing treatment and evidence collection, legal advocacy, and multi-jurisdictional program coordination.[20] Since 2016, FVPP has served 475 Indian and 306

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[16] http://bit.ly/okmulgee-roundup.

[17] NCA 10-210, *available at* http://bit.ly/csc-T14-NCA10-210; NCA 16-038 § 3-301, *available at* http://bit.ly/csc-NCA-16-038-part1.

[18] http://bit.ly/csc-justices; http://bit.ly/csc-law.

[19] http://bit.ly/family-violence-prevention.

[20] *Id.*; http://bit.ly/SANEProgram.

non-Indian clients, and in many areas of the Reservation is the only agency doing so.[21]

The United States Department of Justice recently accorded FVPP's director a National Crime Victim Service award, with Attorney General Sessions declaring that FVPP "has expanded access to specialized populations, including teens and children impacted by dating and sexual violence."[22] Local recognition is effusive and reflects the common understanding that the Nation's jurisdiction spans the Reservation. For example, an Okmulgee County Special District Judge declared this year that "[o]ur county, being rural in nature, is lacking in resources ... to ensure safety, justice, support and healing for adults impacted by sexual or domestic violence. Fortunately, I am able to consistently direct people to the Muscogee (Creek) Nation program for their invaluable resources[.]"[23] Likewise, the Muskogee County District Attorney's Office has recognized that FVPP ensures access to services "in rural communities *across the eleven counties that comprise the jurisdictional boundaries of the Muscogee (Creek) Nation*."[24]

Health Care. The Nation's healthcare system serves more than 30,000 Indian and non-Indian patients each quarter at its two rural hospitals,

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[21] http://bit.ly/MCN-FVPP-Clients; http://bit.ly/FVPP-Map.

[22] http://bit.ly/FVPP-award.

[23] http://bit.ly/Ramirez-Letter.

[24] http://bit.ly/Roberts-Letter (emphasis added); *see also* http://bit.ly/MCN-FVPP-Letters-of-Support (additional letters).

rehabilitation center, and six medical clinics.[25] The Nation's state-of-the-art hospitals, one of which was on the verge of closing before the Nation purchased and rehabilitated it, provide emergency room, laboratory, surgical, and inpatient and outpatient specialty care.[26] The Nation built this expansive system to meet the significant needs of underserved rural communities throughout the Reservation.[27]

The Nation's efforts again are widely recognized. In 2013, for example, University of Oklahoma President (and former Oklahoma Governor and United States Senator) David Boren praised the Nation's "'exceptional' job improving the quality of life for the people in the 11 counties it covers," noting that "'[t]he Creek Nation has brought health care to all the people in its boundaries.'"[28]

Education. The Nation makes vital contributions to education on the Reservation. Its Head Start program serves 286 children and its WIC program serves women and children at 12 clinic locations, all without regard to tribal citizenship.[29] Between 2013 and 2017, the Nation contributed more than $40 million to the State's public education

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[25] http://www.creekhealth.org ("Hospitals" and "Clinics"); http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 5.

[26] http://bit.ly/CH-Hospital; http://bit.ly/CH-MedicalCenter; http://bit.ly/CreekNation-ER-Expansion.

[27] http://bit.ly/MCN-HospitalOpens; http://bit.ly/CreekNation-ER-Expansion.

[28] http://bit.ly/rehab-center-sale.

[29] http://bit.ly/MCN-Head-Start; http://www.mcn-nsn.gov/services/wic/.

fund.[30] The Nation's Department of Education, Employment, and Training partners with local school districts and the Oklahoma Department of Education to improve education outcomes for all students.[31]

These programs are important, but by no means exclusive, examples of the Nation's provision of critical governmental services throughout the Reservation. Far from rendering Oklahoma a "second-class State," Pet. for Cert. 34, the Nation enhances the quality of life for *all* Oklahomans.

B. Affirming the Boundaries of the Creek Reservation Will Not Disrupt the Balance of Civil Jurisdiction.

Ignoring all of this, Petitioner's amici paint tribal jurisdiction as a looming threat. This Court's precedents, however, are not "ambiguous," IMLA Br. 10, and will not permit "a tsunami of uncertainty and jurisdictional litigation," States Br. 20. The Nation's civil jurisdiction is narrowly circumscribed, and State and local governments will continue to regulate non-Indian citizens and businesses.

1. Tribal Civil Jurisdiction Is Highly Restricted.

As a result of the allotment era, significant numbers of non-Indians live on Indian reservations throughout the country. In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court set forth the basic presumption "that the inherent sovereign powers of an Indian tribe do not extend to

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[30] http://bit.ly/GameReport-2017, at 5.

[31] http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 10-11.

[nonmember] activities" on reservation fee land, subject to two circumscribed exceptions.

These two exceptions are not "highly subjective." EFO Br. 9. The first applies to nonmembers in "consensual relationships with the tribe or its members" (such as contracts and leases), *Montana*, 450 U.S. at 565, that are based on their own affirmative, voluntary conduct. Thus, "a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). Moreover, the exception requires a nexus between tribal regulation and the consensual activity – "it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008) (quoting *Atkinson*, 532 U.S. at 656). And under the second exception, non-Indian conduct on fee land may be subject to tribal regulation only if it "imperil[s] the subsistence or welfare" of the tribe. *Id.* at 341 (internal quotation marks omitted) (brackets in original). The operation of a commercial enterprise, by itself, does not remotely satisfy this standard. *Atkinson*, 532 U.S. at 659.

Like other forms of civil jurisdiction, tribal taxing authority is controlled by *Montana*. "An Indian tribe's sovereign power to tax" presumptively "reaches no further than tribal land." *Id.* at 653. For amici's members engaged in commerce with non-Indians on fee land, there is thus virtually no risk of tribal taxation. While amici cite *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195

(1985), in claiming otherwise, *all* involved taxation of mineral development on *tribal trust lands*, which are unaffected by reservation status.

Tribal zoning is likewise subject to the general rule and hence not the threat amici conjure. While this Court upheld tribal zoning of a non-Indian fee parcel in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 444 (1989) (concurring opinion of Stevens, J.), that decision turned on the parcel's location "'in the heart' of over 800,000 acres of closed and largely uninhabited tribal land" and on the prospect that development of this pristine forestland "would place the entire area 'in jeopardy,'" *Atkinson*, 532 U.S. at 658 (quoting *Brendale*, 492 U.S. at 440, 443). Tellingly, in the 30 years since *Brendale*, no case involving tribal zoning of non-Indian lands has reached this Court.

Not only this Court's precedents, but also congressional action, have already addressed amici's concerns. Amicus Oklahoma Independent Petroleum Association (OIPA) suggests that oil and gas production on fee lands will be subject to tribal and federal authority. OIPA Br. 30. But the statutes it invokes, and their implementing regulations, only apply on *Indian trust and restricted fee lands* (regardless of reservation status). *See* 25 U.S.C. §§ 396a, 2102. Contrary to OIPA's claim, Br. 28, this is no different on reservations in Oklahoma than anywhere else.

Nor would affirmance supplant State regulatory authority under the Clean Air Act or the Safe Drinking Water Act. OIPA Br. 27-28, 30-31; EFO Br. 2. The "Inhofe rider" to the SAFETEA Act provides

Oklahoma with special protection in this regard – where Oklahoma is authorized to implement environmental regulations outside Indian Country, the EPA "Administrator shall approve the State to administer the State program ... in Indian country[.]" § 10211(a), 119 Stat. 1144, 1937 (2005). This provision further precludes EPA from delegating environmental authority to the Nation *absent the State's agreement*. *Id.* § 10211(b).

It is not difficult, then, to summarize this Court's precedents: With "one minor exception" – *Brendale* – this Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360. Amici are left to posit that the *mere existence* of tribal jurisdiction portends "confusion and conflict." States Br. 24. But if such conjecture were sufficient, Nebraska would have prevailed in *Parker*. Instead, that decision put such non-textual arguments to rest. 136 S. Ct. at 1082.

2. Reservation Status Does Not Impair the Jurisdiction or Operation of State and Local Governments.

Amici's turgid claims that "the functions of local governments could be greatly impaired, if not completely destroyed," IMLA Br. 4, by an affirmance are likewise divorced from reality. Not surprisingly, these claims are raised by inside-the-Beltway organizations possessing no apparent familiarity with the cooperation between the Creek Nation and local governments. *Id.* 1-2. Nor apparently with this Court's precedents.

Amici posit that "[i]t is unclear how, if at all, the state and local governments would collect taxes in 'Indian Country.'" *Id.* 11. But *all unrestricted fee lands* on the Reservation – regardless of Indian or non-Indian ownership – are subject to State and local property taxation. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111 (1998); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992).[32] Therefore, the Tenth Circuit's decision will have no effect on property tax revenue collected within the boundaries of the Reservation.

State and local governments will also continue to tax nonmembers' commercial activities. This Court has upheld state taxes on non-Indians' on-reservation activities "unless expressly or impliedly prohibited by Congress," *Cotton Petroleum Corp.*, 490 U.S. at 173, and has *never held invalid* a state tax on non-Indian activities on fee lands. It has also upheld a broad range of state taxes on non-Indians *on tribal trust lands*, including oil and gas production taxes, *id.* at 163, and sales and cigarette taxes, *Washington v. Confederated Tribes of Colville Reservation*, 447

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[32] Reservation status likewise does not affect the taxability of Creek trust and restricted fee lands, and of oil and gas production from those lands, which is controlled by various federal statutes. *E.g.*, Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (lands taken into trust for Indians "within or without existing Indian reservations" in Oklahoma "shall be free from any and all taxes" except state tax "upon all oil and gas produced from such lands").

U.S. 134, 151 (1980).[33] Nor will affirmance oust local governments of their existing zoning jurisdiction. IMLA Br. 19, 22-23; *see Brendale*, 492 U.S. at 416, 432 (opinion of White, J.) (upholding county, and rejecting tribal, zoning of fee land in mixed-use area of reservation).

These precedents have enabled Oklahoma's Indian nations and the State and its political subdivisions to resolve jurisdictional conflicts as they arise and to coordinate the delivery of services statewide, as demonstrated by their 600-plus intergovernmental agreements (more than three dozen of which include the Nation).[34]

Intergovernmental cooperation also characterizes Petitioner's issue of concern. He notes that Congress has provided through the Indian Child Welfare Act for tribal jurisdiction over Indian children residing on the Reservation. Br. 56. The Creek Nation's Children and Family Services Administration provides comprehensive services, including guardianship, foster care placement, and reunification, and works in coordination with the Oklahoma Department of Human Services to protect and provide for the best interests of Indian children

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[33] While state jurisdiction may be preempted under the *Bracker* balancing test, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), state and local government interests play a prominent role in that balancing, and to date this Court has invalidated state taxes only in connection with activities on *tribal trust lands*. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983); *Bracker*, 488 U.S. at 138-39, 145-48 & n.12.

[34] http://bit.ly/oksosgov; *supra* n.12.

within its jurisdiction.[35] The Nation's efforts, which further the policies of both Congress and the State, will continue irrespective of the outcome of this case. *See* 25 U.S.C. § 1902 (congressional declaration of policy); Okla. Stat. tit. 10, § 40.1 (recognizing that Indian nations "have a valid governmental interest in Indian children," and establishing State policy "to cooperate fully with Indian tribes in Oklahoma" to enforce "the intent and provisions of the federal Indian Child Welfare Act").

In sum, Reservation status does not divest State and local governments of their authority to tax, zone, or otherwise provide for the health and welfare of their residents. This is as true in metropolitan Tulsa as it is in rural Okemah. Amici's fee lands within the Creek Reservation are not unique: they are, "like millions of acres throughout the United States, non-Indian fee land within a tribal reservation." *Atkinson*, 532 U.S. at 648. Amici's broad-brushed claims are particularly misplaced given the critical governmental services that, as discussed above, the Nation provides throughout the Reservation. Indeed, far from destroying local government functions, from 2015 to 2018 the Nation contributed $29,993,435 to municipal, county, school, and tribal transportation construction and maintenance projects, and over $1.6 million to public schools, fire departments, and rural water systems.[36]

This Court's precedents expose amici's arguments for what they are – empty rhetoric. In

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[35] http://bit.ly/MCN-Child-Family-Services; http://bit.ly/Foster-Care-Agreement.

[36] http://bit.ly/TranaProjects; http://bit.ly/SpecialAppropriations.

Parker, Nebraska predicted that reservation status would bring "profound" "practical consequences," Neb. Br. 30, and "uncertainty and risk for the well-being of citizens of Nebraska," Neb. Cert. Pet. 25. In this case, while again warning that a "tsunami" of conflict will result, States Br. 20, amici including Nebraska fail to point to a single dispute arising in the wake of the *Parker* decision. Thankfully, state, local, and tribal governments do not govern their communities with rhetoric, just as this Court does not decide cases based on the same.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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(Capital Case)

No. 17-1107

In The
Supreme Court of the United States

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The National Congress of American Indians (NCAI) is the oldest and largest organization addressing American Indian interests. Since 1944, NCAI has worked with tribal governments to strengthen their governmental institutions and enable them to better serve both tribal citizens and non-citizens. In particular, NCAI has worked with Congress to enhance law enforcement and improve law and order in tribal communities. NCAI has also worked closely with federal, state and local governments to develop productive models of intergovernmental cooperation to serve all persons within reservation boundaries. NCAI has a strong interest in preserving time-honored principles of Indian law, including the test for reservation disestablishment, which has been relied upon by Indian tribes and lower federal courts for decades.

SUMMARY OF ARGUMENT

In eight decisions spanning 54 years, this Court has articulated the test for determining whether an Indian reservation has been disestablished. *E.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Seymour v. Superintendent*, 368 U.S. 351 (1962). Under this "well settled" precedent, "'only Congress can divest a

[1] No counsel for either party authored this brief in whole or in part, and no person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Parker*, 136 S. Ct. at 1078-79 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). In determining congressional intent, statutory language is "of course" the "most probative evidence." *Id.* at 1079 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Although other evidence may be considered, in the absence of a "clear textual signal," such evidence must "'unequivocally reveal'" widespread contemporaneous understanding that the reservation would be disestablished. *Id.* at 1080 (quoting *Solem* at 471).

The Petitioner and his amici ask this Court to depart from this established test. Their arguments are retreads of those rejected in *Parker* just two years ago. The statutes at issue here contain "none of the[] hallmarks of diminishment," 136 S. Ct. at 1079, or similarly explicit language, yet Petitioner claims that subsequent jurisdictional history and the alleged impact of reservation status require altering the long-settled test to suit them. *Compare* Pet'r's Br. 3-4 (alleging the lower court erred by being "[s]ingularly fixated" on statutory language because state officials had exercised jurisdiction for 111 years and affirmance would cause "turmoil") *with* Pet'r's Br. 20-22, Nebraska v. Parker, 136 S. Ct. 1072 (2016) (No. 14-1406) (claiming statutory language was not important because state officials had exercised jurisdiction over the area for over a century and affirmance would "significantly disrupt" the community).

These arguments must be rejected. Emphasis on statutory language is appropriate because Congress is

the constitutional body charged with authority over Indian affairs and federal territory. Disestablishment of the reservation would abrogate the terms of a treaty and reallocate governmental authority, both actions which have always required clear and plain statements by Congress. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014). There is also nothing about Creek history that permits departure from the Court's well-settled analytical structure. As Petitioner admitted below,[2] the Creek possessed a reservation established by treaty and which was consistently recognized by the Executive Branch, Congress, and the courts. Section I(B)&(C), *infra*. The statutes alleged to terminate that reservation also fit comfortably within the framework addressed under the established test for "surplus land acts." Section I(D), *infra*. Moreover, when Congress enacted these statutes, it was clear that statehood, state jurisdiction, and federal control over tribal institutions were fully consistent with reservation status. Section I(E), *infra*.

Even though *Parker* reaffirmed that the alleged negative impact of reservation status does not permit judicial rewriting of history, 136 S. Ct. at 1081-82, Petitioner's amici devote much of their argument to speculating about alleged negative impacts.[3] Their

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[2] Resp't-Appellant Br. at 11-12, *Murphy v. Royal* ("Respondent [Petitioner on certiorari] agrees that Petitioner committed the murder within the boundaries of the Muscogee (Creek) Reservation.").

[3] Amici repeatedly cite *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), and the "justifiable expectations" of state and local governments, *e.g.*, Brief for Nebraska et al., as

overblown claims are not just legally irrelevant, they are divorced from the realities of federal Indian law. Under existing jurisprudence, jurisdiction over almost all non-Indian activities on fee land will remain unchanged: tribes will not have jurisdiction, and states and local governments will. Section II(A), *infra*. Indeed, the experience of communities throughout the country shows that with intergovernmental cooperation, reservation status can increase economic opportunities and improve governmental services for both tribal and non-tribal citizens. Section II(B), *infra*.

ARGUMENT

I. SUPREME COURT PRECEDENT ON RESERVATION BOUNDARIES FULLY APPLIES TO THE STATUS OF THE CREEK RESERVATION.

The well-settled test for determining whether Congress has disestablished reservation boundaries fully applies here. The test simply implements the mandate to construe statutes in accordance with congressional intent, and to require clear evidence before finding Congress has invaded traditional governmental authority. Clear evidence is required here because solemn treaty promises made by the United States

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Amici Curiae Supporting Petitioner at 9, 13, 25, ignoring *Parker*'s instruction that *Sherrill* is irrelevant to the "single question of diminishment" raised by Petitioners here as in *Parker*. *Parker*, 136 S. Ct. at 1082.

established a reservation for the Creek Nation. These statutes are well within the class of allotment statutes that the *Solem* test was designed to interpret, and nothing about Oklahoma statehood or Creek history undermines that fact.

A. The Established Test Protects the Division of Authority Between Congress and the Court.

Petitioner would have this Court believe that its test for determining whether Congress has altered reservation boundaries is something idiosyncratic, appropriate only for some sui generis group of statutes. It is not. At its heart, the reservation boundary test, with its focus on statutory language and other unequivocal evidence of congressional intent, simply implements the constitutional division of responsibility between Congress and the courts, as well as the need for clear evidence before finding Congress intended to invade traditional governmental boundaries.

From its earliest years, the Supreme Court has recognized that "the duty of the court [is] to effect the intention of the legislature." *Schooner Paulina's Cargo v. United States*, 11 U.S. 52, 60 (1812). This duty derives from the Constitution itself, and the allocation of "[a]ll legislative Powers" to Congress. U.S. Const. art. I, § 1; *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment). In the diminishment test, "[a]s with any other question of statutory

interpretation," the statutory text is the most important part of this analysis. *Parker*, 136 S. Ct. at 1080 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)); *accord Pennington v. Coxe*, 6 U.S. 33, 52 (1804) (Marshall, C.J.) ("[A] law is the best expositor of itself").

Where Congress is alleged to have changed reservation boundaries, the importance of statutory text is enhanced by requirement of a "clear statement before courts will find congressional displacement of the usual allocation of institutional authority." *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 458 (1989); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 415-17 (1993) (discussing application of this rule to Indian affairs). In such cases, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). Like treaties with Indian tribes, for example, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Similarly, courts will not interpret federal jurisdiction to operate extraterritorially unless "the affirmative intention of the Congress [is] clearly

expressed," *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010), or find that statutes of limitations deprive courts of jurisdiction absent a "clear statement" of congressional intent to achieve this "unique" disruption of judicial authority. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

Indian affairs, like these other areas adjusting sovereign authority, is an area where courts must tread carefully absent clear evidence of congressional intent. The Constitution vests Congress with authority over Indian affairs through the commerce, war, and territorial powers, U.S. Const. art. I, § 8, cls. 3 & 11-12; *id.* at art. IV, § 3, cl. 2, and together with the Executive through the treaty power. *Id.* at art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200-04 (finding authority in the commerce and treaty powers); *United States v. Celestine*, 215 U.S. 278, 284 (1909) (locating authority in the territorial power); *Worcester v. Georgia*, 31 U.S. 515, 558-59 (1832) (finding authority in the war, treaty, and commerce powers). The Indian affairs power, therefore, emphatically belongs to Congress, not the judiciary. *See Lara*, 541 U.S. at 200 (noting that "we have consistently described" Congress' Indian affairs powers "as plenary and exclusive.").

Where a statute is alleged to invade traditional tribal authority, moreover, the courts' interpretive role is tempered by "the profound importance of the tribes' pre-existing sovereignty." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 n.5 (2016). Therefore, for almost two hundred years, this Court has demanded evidence of clear congressional intent before finding

termination of tribal rights. *See Worcester*, 31 U.S. at 554 (stating that had Cherokee treaty been intended to remove tribal self-governance "it would have been openly avowed"). The demand for clear evidence was reaffirmed in the allotment era. *See Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (asserting federal jurisdiction over reservations "requires a clear expression of the intention of congress"); *Celestine*, 215 U.S. at 290-91 (stating that allotment act must "be construed in the interest of the Indian" to continue guardianship absent "clear" evidence of congressional intent). In the modern era, it has become a mainstay of federal Indian law. *Parker*, 136 S. Ct. at 1079-80 (demanding "clear" and "unequivocal" evidence); *Bay Mills*, 134 S. Ct. at 2031 (requiring "clear" and "unequivocal[ ]" evidence); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (demanding "unmistakably clear" evidence); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

Petitioner and his amici would have the Court chart a unique course in construing the allotment statutes at issue here, divorcing them from their text and traditional rules of construction. The Court should not accept this invitation. Two hundred years of case law and respect for the traditional allocation of institutional authority, rooted in the Constitution itself, forbid it.

B. The Creek Nation had a Reservation Before Allotment.

Because they cannot win under existing precedent, Petitioner and his amici make a last-ditch attempt to evade it by claiming the United States never established a reservation for the Creek Nation. Pet'r's Br. 5, 19, 23-24; Petroleum Amicus Br. 2, 9-12. It would be a cruel joke if the territory solemnly guarantied the Creek Nation in exchange for leaving its eastern homelands and walking the Trail of Tears did not have protected reservation boundaries. But, of course, this is not the case. By the time Congress enacted the statutes at issue here, "reservation" had taken on its modern meaning as an area "set apart . . . for residence of the tribe of Indians by the United States," *United States v. Kagama*, 118 U.S. 375, 383 (1886), where jurisdiction was "independent of any question of title," *United States v. Thomas*, 151 U.S. 577, 579 (1894), and whose boundaries could only be altered by Congress. *Celestine*, 215 U.S. at 284. Courts, Congress, and the executive all agreed that the treaties with the Creek Nation established a reservation in this sense.

The term "reservation" was derived from public land law and referred to any tract of land set aside by the government for a specific purpose. *Celestine*, 215 U.S. at 284; Henry Campbell Black, *A Law Dictionary* 1026 (2d ed. 1910). Public authorities, therefore, used the term reservation to describe everything from naval timber reserves, Act of Mar. 1, 1817, ch. 22, 3 Stat. 347,

to lead mines, *United States v. Gear*, 44 U.S. 120 (1845), to individual lands for veterans, and salt licks for the public. *Edwards' Lessee v. Darby*, 25 U.S. 206 (1827).

Indian treaties of the 1830s often used "reservation" to refer to lands set aside for any individual or public purpose. *E.g.*, Treaty with the Choctaw, arts. XIV, XV, XVII, XIX, 7 Stat. 333 (1830) (describing individual "reservations" for various Choctaws and non-Choctaws); Treaty with the Cherokee, arts. III, IV & XIII, 7 Stat. 478 (1835) (describing military reservations, reservations to individual mixed-bloods, and for missionaries). The 1832 Treaty with the Creeks does this as well, describing an "agency reserve" and temporary individual "reserves" in the ceded lands east of the Mississippi. Treaty with the Creeks, art. II, 7 Stat. 366 (1832). The Treaty also "solemnly guarantied" the Creek a territory west of the Mississippi, where "they shall be allowed to govern themselves." *Id.* at art. XIV. The following year, another treaty was executed specifically "to establish boundary lines" for these Creek lands. And while this 1833 treaty did not use the term "reservation," it created one by setting aside the land as a "permanent home to the whole Creek nation," and setting forth the precise boundaries in geographic terms. Treaty with the Creeks, pmbl. & art. II, 7 Stat. 417 (1833); *see also* Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 31-1, 36 (1850) (describing reservations as "permanent homes" with "well-defined boundaries"); Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 34-1, 338 (1855) (same).

It became more common in the 1850s to use the term "reservation" to refer to tribal territories, but the word was just becoming a term of art, and many reservations were created without using that term. *See, e.g.*, Treaty with the Menominee, art. II, 10 Stat. 1064 (1854) (creating a reservation by setting aside land "to said Indians for a home"); *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968) (acknowledging that the "Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854"). It is thus not surprising that federal documents of this period refer to the Creek territory not only as a reservation but as "Creek country." *E.g.*, Treaty with the Creeks, etc., art. II, 11 Stat. 699 (1856); Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 34-5 (1856). Even more than the term reservation, "Creek country" signifies the distinct boundaries and jurisdictional status relevant in this case. As this Court held with respect to the similar treaty lands of the Cherokee Nation, the territory "ha[d] been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority." *United States v. Rogers*, 45 U.S. 567, 572 (1846).

By the late nineteenth century, the definition of the term "Indian reservation" was well-established. Congress tied jurisdiction to reservation status, Act of July 31, 1882, ch. 360, 22 Stat. 179, 179 (amending Indian trader statutes to apply "on any Indian reservation"); Major Crimes Act, ch. 341 § 9, 23 Stat. 362, 385 (1885) (authorizing federal criminal prosecutions for

certain crimes committed "within the limits of any Indian reservation"), and this Court followed Congress' lead by holding that all land within reservation boundaries—regardless of land ownership—was subject to federal jurisdiction. *Thomas*, 151 U.S. at 585. It is this definition that is relevant in reservation boundary cases like this one.

Congress and the Executive Branch now regularly referred to the "Creek Reservation" when describing the boundaries of Creek territory. For example, the 1866 Treaty with the Creek Nation refers to Creek lands as a "reduced Creek reservation," Treaty with the Creek Indians, art. IX, 14 Stat. 785, 788 (1866), as does an 1866 Treaty with the Cherokee Nation. Treaty with the Cherokee, art. IV, 14 Stat. 799, 800 (1866). Congress and the executive also repeatedly referred to these treaty boundaries as defining the "Creek Reservation." *E.g.*, Cong. Globe, 42nd Cong., 1st to 3d Sess. 763-65, 1258, 2117 (1873) (repeatedly referring to the "Creek Reservation" and the "Creek Indian Reservation" in discussing a bill authorizing "negotiat[ion] with the Creek Indians for the cession of a portion of their reservation occupied by friendly Indians"); 11 Cong. Rec. 2351 (1881) (discussing a map showing a "dark line running north and south represent[ing] the dividing line between the Creek reservation and their ceded lands").[4]

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[4] The Creek reservation appeared on Department of Interior maps through 1918. *See* JA79-117 (through 1914); http://www.mcnnsn.gov/wp-content/uploads/Attorney%20General/Interior%20Reservation%20Maps%201915-1917.pdf (1915-17).

Courts also repeatedly recognized that distinct jurisdictional rules applied on the Creek Reservation regardless of land ownership. In 1900, the Court of Appeals for the Indian Territory held that the Creek territory was a reservation:

> The contention that the Creek Nation is not now an Indian reservation is not tenable. . . . [N]or can it be successfully maintained that because the United States [gave the Creeks] a fee-simple title thereto . . . it is not in possession of the Creeks as an Indian reservation.

Maxey v. Wright, 54 S.W. 807, 810 (1900). In 1905, the Eighth Circuit upheld Creek authority to tax non-Indian activities on fee lands on the reservation, holding that it was "beyond debate" that the Nation retained "authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866." *Buster v. Wright*, 135 F. 947, 949, 951 (8th Cir. 1905).

When Congress enacted the statutes at issue here, in other words, Congress, the courts, and the executive all recognized that the Creek Nation had a reservation. There must, therefore, be evidence of clear congressional intent before those treaty-prescribed boundaries are altered.

C. Fee-Simple Ownership is Completely Consistent with Reservation Status.

Contrary to the suggestions of Petitioner and his amici, fee-simple ownership is in no way inconsistent

with reservation status. *Cf.* Pet'r's Br. 5, 19; Petroleum Amicus Br. 2. Petitioner's statement that "[i]n a traditional reservation, the federal government holds title to the land in trust on behalf of the tribe," Pet'r's Br. 23-24, relies on a non-legal website, which Petitioner follows by citations to sources that fail to support the proposition.[5] Actual legal sources, however, establish that fee-simple ownership does not undermine reservation status. Indeed, fee patents were intended to *enhance* federal protection for Creek boundaries, and this Court later held that Creek fee lands had the same status as other tribal lands.

Throughout the nineteenth century, reservations were created using many different forms of land tenure.[6] *Cohen's Handbook of Federal Indian Law* notes

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[5] The Petitioner claims to find this proposition in a Bureau of Indian Affairs "Frequently Asked Questions" page. Pet'r's Br. 24. This misreads the website and is directly contradicted by the controlling statute, which provides that reservation status exists "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). To support this misreading, Petitioner cites *Spalding v. Chandler*, 160 U.S. 394 (1896), whose only reference to "trust" is the non-Indian plaintiff's unsuccessful attempt to have lands removed from an "Indian reserve" and put in trust for him, and the 2012 edition of *Cohen's Handbook of Federal Indian Law*, whose cited pages actually state that reservations include unrestricted fee land. *Cohen's*, *supra*, § 3.04[2][c][ii] at 190-92.

[6] Many treaties fix boundaries without saying anything about land tenure. *See, e.g.*, Treaty with the Kickapoos, art. II, 7 Stat. 202 (1819). Other treaties set apart land for "use and occupation" of the tribes. *See, e.g.*, Treaty with the Navajo, art. II, 15 Stat. 667 (1868). Still other treaties provide that reservations would contain all individually-owned allotted land from their inception. *See, e.g.*, Treaty with the Oneidas, 7 Stat. 566 (1838); Treaty with the Chippewa, arts. II-III, 14 Stat. 637 (1864).

that the "language used to define the character of the estate guaranteed to a tribe by treaty varied so considerably that any detailed classification would not be useful." § 15.04[3][a] at 1006. Use of the term "trust" to describe a specific form of land tenure, moreover, was not common in the treaty period, and did not appear in a general statute until the 1887 General Allotment Act (GAA). *Id.* § 15.03 at 998 (citing GAA, ch. 119, 24 Stat. 388).

Cohen's Handbook lists grants in fee simple first in describing common forms of reservation land tenure. *Cohen's*, *supra*, § 15.04[3][a] at 1006. The Creek Nation, therefore, was hardly "unique." *Cf.* Pet'r's Br. 5. Multiple treaties other than those with the Five Tribes established reservations to be held in fee simple. *E.g.*, Treaty with the New York Indians, art. II, 7 Stat. 550 (1838) (setting apart land "[t]o have and to hold the same in fee simple to the said tribes or nations of Indians"); Treaty with the Senecas & Shawnees, art. II, 7 Stat. 411 (1832) (granting lands "in common . . . in fee simple; but the lands shall not be sold or ceded without the consent of the United States"); Treaty with the Wyandots, etc., art. VI, 7 Stat. 160 (1817) (granting "by patent, in fee simple" reservations for the Wyandot, Seneca, and Shawnee tribes). Such reservations, moreover, were created and ceded with the same formalities as any other reservation. *E.g.*, Treaty with the Seneca, arts. I-II, 7 Stat. 348 (1831) (providing for cession of fee-simple reservation granted under prior treaty and grant of 67,000 acres "by patent, in fee simple, as long as they shall exist as a nation and remain on the same").

Petitioner's suggestion that fee simple is inconsistent with reservation status is particularly bizarre because the definition of reservation emerged at a time when allotment meant that many reservation lands would be held in fee simple. The 1882 act found not to diminish the Omaha reservation in *Parker*, for example, provided that after twenty-five years allotments would be conveyed to the allottees "in fee." Act of Aug. 7, 1882, ch. 434, § 6, 22 Stat. 341, 342. Not long thereafter, in *Celestine*, the Court held that reservations included fee-patented land, 215 U.S. at 284, and Congress codified this longstanding consensus in the Indian Country Act. 18 U.S.C. § 1151(a).

Indeed, far from being a lesser form of tribal ownership, when the federal government granted the Creek Nation its lands, fee-simple status was believed to create *more* federal protection for tribal lands. After *Johnson v. M'Intosh* ruled that the doctrine of discovery gave the United States "absolute ultimate title" in tribal lands, 21 U.S. 543, 592 (1823), some argued that this title was inconsistent with tribal sovereignty. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 22 (1831) (Johnson, J., dissenting); *but see Mitchel v. United States*, 34 U.S. 711, 746 (1835) (declaring the Indian "right of occupancy . . . as sacred as the fee simple of the whites"). To help persuade tribes to cede their eastern lands, therefore, the Indian Removal Act authorized the President to provide tribes with fee patents to help "solemnly to assure the tribe or nation . . . that the United States will forever secure and guaranty [their lands] to them." Indian Removal Act, § 3, 4 Stat. 411,

412 (1830). Relying on such promises, both the Creek and Cherokee Nations later argued that their fee patents limited federal authority over their lands. *See United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 (1902) (fee patents did not prevent the U.S. from issuing oil leases on Cherokee lands); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) (fee status did not prevent United States from granting railroad right-of-way). The Supreme Court, however, found that the lands had the same status as other tribal lands: they were under the "control and management of [the federal] government," and "subject to limitations inhering in such a guardianship." *Creek Nation*, 295 U.S. at 109-10.

Generations of treaties, judicial decisions, and congressional acts establish that fee ownership is consistent with reservation status. Petitioner's invitation to find otherwise should be declined.

D. This Court Created the Disestablishment Test to Interpret Statutes Like These.

The statutes at issue here fit neatly within *Solem*'s description of "surplus land acts": statutes enacted "at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." 465 U.S. at 467. As *Solem* recognized, "each surplus land Act employ[s] its own statutory language, the product of unique set of tribal negotiation and

legislative compromise." *Id.* As Respondent discusses, the differences in the statutes here provide stronger evidence against reservation termination than presented in previous cases. Resp't Br. 27. In addition, even more clearly than in previous cases, Congress considered unambiguously terminating reservation status by obtaining a tribal cession of defined land in exchange for a sum certain, yet chose not to take that path.

The statutes at issue here were enacted during the same time period as those in previous reservation-boundary cases. This case concerns statutes enacted between 1893 and 1906; the eight earlier cases involved statutes enacted between 1882 and 1908. The Petitioner, however, tries to obscure the fact that he is asking this Court to find clear Congressional intent to disestablish the Creek Reservation despite the use of statutory language—sometimes by the same Congresses—that this Court has previously found insufficient.

The statutes at issue here are also clearly allotment statutes. The first statute is the 1893 authorization to seek allotment or cession of the lands of the Five Tribes, and the creation of a commission to negotiate the same. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645. Tellingly, the first head of this commission was former Senator Henry Dawes, so associated with allotment that the "Dawes Act" is an alternate name for the General Allotment Act. 2 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 666-71, 748-49 (1984). Although Dawes

died in 1903, it remained the "Dawes Commission" that oversaw allotment of Five Tribes territories, and the "Dawes rolls" that identified those eligible for allotment. Allotment of the Indian Territory, in other words, was not an exception to the allotment policy, but the eponymous final project of its best-known architect.

The subsequent acts increasing federal and territorial authority and decreasing tribal authority were all integral components of a long process designed to coerce Creek agreement to allotment. The 1897 provision which extended federal judicial jurisdiction and U.S. law, as well as incorporating Arkansas law over all persons, comes at the end of a paragraph reciting the appropriations for and duties of the Commission negotiating allotment. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. The 1898 provisions of the Curtis Act abolishing tribal courts and preventing enforcement of tribal laws in U.S. courts come at the end of a long list of provisions regarding allotment, Act of June 28, 1898, ch. 517, §§ 11-26, 28, 30 Stat. 495, and before a section scheduling a Creek election at which, Congress hoped, the Creek people would finally agree to allotment. § 30, 30 Stat. at 514. Despite the incursions on Creek sovereignty, the election failed, resulting in yet another negotiated agreement in 1901. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. Even this agreement apparently did not settle matters, leading to a supplemental agreement that, among other things, made taxes on cattle grazing on unallotted lands mandatory, and imposed fines on those who grazed cattle on the Creek Nation

without a permit. Act of June 30, 1902, ch. 1323, § 17-18, 32 Stat. 500, 504. Both the 1901 and 1902 agreements were dependent on ratification by the Creek Nation and implementation by the Creek President. *See* § 28, 31 Stat. at 867-68; §§ 21-22, 32 Stat. at 505.

Like the acts construed in previous cases, the operative statutes also open certain lands to non-Indian purchase. All of the statutes provide for non-Indian purchase of lands within towns on the reservation. *E.g.*, 31 Stat. at 865. The Five Tribes Act, ch. 1876, 34 Stat. 137 (1906), the final statute regarding allotment, is even more comprehensive. By this time, the Supreme Court had ruled that tribal consent was not necessary to allot treaty lands. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The Five Tribes Act, therefore, broadly provides that all lands not otherwise disposed of "shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes." § 16, 34 Stat. at 143. This language is similar to the provisions regarding sales of unallotted lands in *Parker*, §§ 2-3, 22 Stat. at 341, and provides even stronger evidence of continued reservation status than the language construed in *Solem*, *Seymour*, and *Mattz v. Arnett*, 412 U.S. 481 (1973), which provide for sale according to homestead and other general laws. *See* Act of May 29, 1908, ch. 218, § 2, 35 Stat. 460, 461 (*Solem* act); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 80, 80-81 (*Seymour* act); Act of June 17, 1892, ch. 120, 27 Stat. 52, 52-53 (*Mattz* act).

Despite Petitioner's ballyhoo that there is some uniform category of "surplus land acts," and the Creek statutes do not fall into it, not all statutes construed as surplus land acts even use the term. *Compare* § 2, 35 Stat. at 461 (*Solem* act, not using term surplus) *and* 27 Stat. at 52 (*Mattz* act, not using term surplus), *with* § 3, 34 Stat. at 80 (*Seymour* act, using term surplus). The Five Tribes Act does, however, specifically refer to unallotted lands as "surplus lands." § 16, 34 Stat. at 143.

The statutes at issue here also resemble other allotment acts in their treatment of allotments. Allotted lands are temporarily immune from taxes and encumbrances, but this immunity lifts after a period of time or for persons believed capable of managing their lands. *Compare* § 19, 34 Stat. at 144 (restricting lands owned by full-bloods for twenty-five years) *and* § 16, 32 Stat. at 503 (restricting allotments for five years, and homesteads for twenty-one years), *with* GAA, § 5, 24 Stat. at 389 (restricting allotments for twenty-five years) *and* Burke Act, ch. 2348, 34 Stat. 182, 183 (1906) (authorizing early lifting of restrictions for those "capable of managing his or her affairs"). Likewise, inheritance of allotted land is subject to state or territorial law. *Compare* § 6, 32 Stat. at 501, *with* GAA, § 5, 24 Stat. at 389. In addition, consistent with other allotments of the time, Creek allottees could temporarily lease their lands for limited purposes. *Compare* § 17, 32 Stat. at 504, *with* Act of May 31, 1900, ch. 598, 31 Stat. 221, 229. These policies did not constitute

diminishment in previous cases, and they do not do so here.

Congress knew full well how to diminish the Creek Reservation, and knowingly took another path. In the 1866 Treaty, the Creek Nation agreed to "cede and convey to the United States . . . the west[ern] half of their entire domain" in exchange for a lump sum of almost a million dollars. Treaty with the Creek Indians, art. III, 14 Stat. 785 (1866). This is like the cession and lump sum language the Court has found "precisely suited to terminating reservation status." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). In 1893, however, Congress authorized the Dawes Commission to negotiate *either* "cession . . . to the United States" *or* "allotment and division . . . in severalty." § 16, 27 Stat. at 645. After finding "unanimity among the people against the cession of any of their lands to the United States," the Commission early on "abandoned all idea of purchasing any of it and determined to offer them equal division of their lands." J.A. 19. While the Commission admitted it would be simpler if the Five Tribes agreed to "a cession of the entire territory at a given price," there were "great difficulties" in even getting the Tribes to "accept allotment in severalty." J.A. 27-28. It therefore abandoned any efforts to seek reservation diminishment.

Again, this is familiar territory from other cases. The first modern diminishment decision held that a 1906 allotment act did not diminish the Colville reservation because while an earlier act had restored lands in the southern portion of the reservation to the public

domain, there was no similar language in the 1906 act. *Seymour*, 368 U.S. at 356. Similarly, in *Mattz v. Arnett*, the Court found that failed bills that would have terminated the Klamath Reservation "compel[] the conclusion" that a subsequent act did not do so. 412 U.S. at 504. Most recently, in *Parker*, the Court held that in 1882 "Congress legislated against the backdrop" of two earlier laws that diminished the Omaha Reservation "'in unequivocal terms.'" 136 S. Ct. at 1080 (citation omitted). As in *Seymour* and *Mattz*, the "change in language . . . undermine[d] petitioners' claim" that the 1882 act diminished the reservation. *Id.*

In short, what happened to the Creek Reservation was not exceptional. The statutes and their history reflect the distinct situation of the Creek Nation, but their key elements—allotting tribal territories, eventually lifting restrictions on sale and taxation, and selling other lands for the benefit of the tribe—are the same as those in this Court's previous cases. Their result—extensive non-Indian settlement—is the same as well. Even more than in previous cases, moreover, the statutes and their history contradict congressional intent to affect reservation boundaries. This Court's decisions from *Seymour* to *Parker* dictate how to interpret these statutes.

E. Neither State Jurisdiction nor Reduction in Tribal Authority is Inconsistent with Reservation Status.

The Petitioner argues that statehood, the diminishment of Creek authority, and comprehensive federal and state jurisdiction are inconsistent with reservation status. As Respondent has shown, the statutes at issue here themselves undercut this argument, by expressly preserving tribal and federal authority in the territory. Resp't Br. 32-35, 39-42, 45-48. But these arguments would fail even absent statutory rebuttal, because they are inconsistent with over a century of congressional policy and Supreme Court decisions—some even involving the Creek Nation itself.

Statehood is simply not inconsistent with reservation status. Before enacting the first of these statutes, Congress passed the Major Crimes Act providing that it applied on "any Indian reservation" and "within the boundaries of any State." § 9, 23 Stat. at 385. The Supreme Court quickly found that statehood was not a constitutional bar to federal jurisdiction on reservations, *Kagama*, 118 U.S. at 383-84, and reaffirmed this conclusion throughout the allotment period. *Thomas*, 151 U.S. at 585; *Donnelly v. United States*, 228 U.S. 243, 263 (1913). The Court later implicitly endorsed this conclusion with respect to the Creek Nation itself, finding that the fact that tax immunity of Creek allotments might "embarrass the finances of a state or one of its subdivisions" was irrelevant to

the question of whether tax immunity existed. *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943).

Nor is the alleged existence of state jurisdiction inconsistent with reservation status. State jurisdiction over non-Indians on reservations was well-established before the passage of the laws at issue here. *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding states had exclusive jurisdiction over crimes between non-Indians). And allotment acts themselves often imposed state taxation on Indian-owned fee lands. *E.g.*, Burke Act, 34 Stat. at 183.

The consistency of state jurisdiction and reservation status has been reaffirmed in the modern era. In 1948, the same year Congress codified the definition of reservations, it also gave New York criminal jurisdiction over Indians "on Indian reservations" in the state. Act of July 2, 1948, ch. 809, 62 Stat. 1224. A few years later, as a result of Public Law 280, ch. 505, 67 Stat. 588 (1953), Indians in many states became subject to state civil and criminal jurisdiction. This Court nevertheless declared that Public Law 280 was not the equivalent of a termination statute, and relied on this Court's reservation boundary jurisprudence to find that "clear" language was still necessary to infer further intrusions on tribal sovereignty. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392-93 (1976) (quoting *Mattz*, 412 U.S. at 504-05).

Federal control over tribal governmental institutions also does not undermine reservation status. Although the Petitioner insists that the relevant

statutes contemplated dissolution of the Creek Nation, Pet'r's Br. 28-32, Congress explicitly repealed the dissolution provision, and never reenacted it. Act of Mar. 2, 1906, 34 Stat. 822, 822. With respect to the Creek Nation, this Court resoundingly declared, "[t]hat Nation still exists." *Seber*, 318 U.S. at 718. Furthermore, if federal jurisdiction and control over tribal governmental institutions were inconsistent with reservation status, there would be no reservations in the United States. *See United States v. Wheeler*, 435 U.S. 313, 327-28 (1978) (describing federal control over tribal courts); Prucha, *supra*, at 646-48 (describing federal control over tribal courts and police beginning in the 1870s). Federal control simply does not mean tribes lack sovereignty on their lands. *Wheeler*, 435 U.S. at 328.

In short, the argument that the relevant statutes are inconsistent with reservation status depends on propositions this Court has soundly rejected, sometimes with regard to the Creek Nation itself. They cannot decide this case.

II. RESERVATION STATUS WILL NOT BE DISRUPTIVE.

Petitioner's laments about the effect of reservation status are divorced from both federal Indian law and the realities of the Creek Nation. They ignore decades of jurisprudence holding that tribes generally lack jurisdiction and states have comprehensive jurisdiction over non-Indians on reservation fee land. They also ignore the wealth of intergovernmental agreements

between tribes, states, and municipalities—many of which the Creek Nation already has in place—that resolve jurisdictional uncertainty and help ensure that hundreds of predominantly non-Indian cities and towns thrive within reservations. Indeed, although Nebraska and Michigan join a brief focused on the difficulties of reservation status, they provide no examples of these difficulties from Pender, Nebraska, or Mount Pleasant, Michigan, cities recently affirmed to be on Indian reservations. With respect to law enforcement in particular, the addition of tribal and federal resources will likely result in better outcomes for both Indians and non-Indians on the Creek Reservation.

A. With Intergovernmental Cooperation, Predominantly Non-Indian Cities and Towns Thrive Within Reservations.

There are hundreds of predominantly non-Indian cities and towns within reservations. These communities experience many benefits from reservation status, including federal tax credits for non-Indian businesses and economic opportunities from doing business with Indian tribes. Decades of case law establish that for non-Indians in such communities, jurisdiction is little different than outside reservation boundaries. The rapidly growing number of agreements between tribal and non-tribal governments, moreover, cabins any remaining uncertainty, and ensures that overlapping jurisdiction in fact leads to more efficient services for both Indians and non-Indians.

To begin, it is important to note that reservation status does not affect jurisdiction over the vast majority of non-Indian activities on reservation fee land. On fee land—the only land affected by reservation status—tribal jurisdiction over non-Indians is "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008) (rejecting tribal jurisdiction over sale of fee land); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (rejecting tribal hotel occupancy tax); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (rejecting tribal court jurisdiction over wrongful death action); *Montana v. United States*, 450 U.S. 544, 564-65 (1981) (rejecting tribal jurisdiction over non-Indian fishing). State jurisdiction over non-Indians, in contrast, is presumptively valid absent meaningful federal and tribal involvement. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (upholding state oil and gas severance taxes); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding state cigarette taxes). Even with respect to tribal citizens, many federal allotment statutes authorize state and municipal property taxes on Indian-owned fee land. *E.g., Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258-59 (1992) (holding that GAA, as amended by the Burke Act, authorized taxation of allotments).[7]

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[7] At page 30 of its brief, Petroleum Amicus claim that if this Court acknowledges the Creek Reservation, their contracts with the tribe or its citizens may be void absent federal approval. This

This jurisprudence has been accompanied by an "increasing trend" toward intergovernmental agreements ensuring that jurisdictional overlap leads not to uncertainty, but to cooperation. *See* Conference of Western Attorneys General, *American Indian Law Deskbook* § 14.1 (2018). According to the Conference of Western Attorneys General, such agreements not only "resolve the core uncertainties" on jurisdiction, but also result in more effective service delivery. *Id.* § 14 Introduction; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (noting that states can "enter into agreements with the tribes to adopt a mutually satisfactory regime for [tax] collection"). The National Conference of State Legislatures (NCSL) similarly reports that intergovernmental agreements are often "the best way to provide services to these unique populations without wasting valuable resources on ineffective programs." Susan Johnson et al., NCSL, *Government to Government: Models of Cooperation Between States and Tribes* 3 (2009).

Several states, including Oklahoma, have statutes broadly authorizing their officials to negotiate intergovernmental agreements with tribes.[8] Oklahoma's

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is simply incorrect. The Secretary of the Interior only approves a subset of contracts that relate to either trust lands or fee lands subject to restrictions on alienation. *See* 25 U.S.C. § 81; 25 C.F.R. § 212.30; 25 U.S.C. § 2102.

[8] *E.g.*, Idaho Code Ann. §§ 67-4001 to 67-4003; Mont. Code Ann. §§ 18-11-102 to 18-11-112; Neb. Rev. Stat. §§ 13-1501 to 13-1509; N.M. Stat. Ann. §§ 11-1-1 to 11-1-7; Wash. Rev. Code Ann. §§ 39.34.010 to 39.34.230.

statute notes that this cooperation is "in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments." Okla. Stat. tit. 74, § 1221(B). The website of the Oklahoma Secretary of State lists hundreds of tribal-state agreements, including many on taxation and law enforcement. *See* Tribal Compacts and Agreements, https://www.sos.ok.gov/gov/tribal.aspx.

Like Oklahoma, "[n]early every state that has Indian lands within its borders has reached some type of tax agreement with the tribes." Judy Zelio, National Conference of State Legislatures, *Piecing Together the State-Tribal Tax Puzzle* (2005). Such agreements "benefit both governmental entities by streamlining the tax collection process and facilitating compliance with state and tribal law." Deskbook, *supra*, § 14.8. In family law, moreover, tribal-state cooperation is "vital for the thousands of American Indian and Alaska Native children who are over-represented in state and tribal welfare systems." Johnson, *supra*, at 72. In law enforcement, too, the Western Attorneys General report, cross-deputization creates relationships between "tribal and non-tribal police officers" that "can enhance the effectiveness of law enforcement." Deskbook, *supra*, § 14:10.

There are also distinct financial advantages to doing business in Indian country. Non-Indian businesses on reservations benefit from accelerated depreciation, 26 U.S.C. § 168(j), economic empowerment zone credits, 26 U.S.C. § 1391(g)–(h); 26 U.S.C. § 1392; 26 U.S.C. § 1396, and other incentives. *Cohen's*, *supra*, § 21.02[4] at 1330. Tribes themselves have become valuable

economic partners. They employ hundreds of thousands of Indians and non-Indians. In fact, many tribes are the largest employers in their regions, and are the lifeblood of areas where manufacturing jobs have disappeared. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Calif. L. Rev. 799, 833 (2007); *see also* Jonathan B. Taylor, *The Economic Impact of Tribal Government Gaming in Arizona* 9 (1999) (discussing the Tonto Apache Tribe, which became the largest employer in Payson, Arizona after a local lumber mill closed). This is true in Oklahoma, where individual tribal nations are the fourth, twelfth, twenty-third, thirty-second, and fifty-second largest employers in the state. Oklahoma Dept. Commerce, Oklahoma Employers—1,500 or more employees, 2018 State Ranking, https://okcommerce.gov/wp-content/uploads/2018/02/Oklahoma-Largest-Employers-List.pdf. Broad statistical and econometric analyses show that tribal businesses not only increase employment in surrounding areas, but also result in substantial income gains. Randall K.Q. Akee et al., *Social and Economic Changes on American Indian Reservations in California: an Examination of Twenty Years of Tribal Government Gaming*, 18(2) UNLV Gaming Res. & Rev. J. 39, 53-54, 57 (2014); Jonathan B. Taylor et al., *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities*, Harvard Project on American Indian Economic Development 19-23 (2000).

With cooperation, therefore, non-Indian cities thrive within reservation boundaries. The cities of

Tacoma, Washington, located partially within the Puyallup Reservation, and Mount Pleasant, Michigan, located within the Saginaw Chippewa Tribe's Reservation, provide telling examples. After generations of dispute, a federal settlement affirmed the boundaries of the Puyallup Reservation to include sizable portions of the over 200,000-person City of Tacoma and other predominantly non-Indian cities. *See* Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83. Puyallup businesses include a casino, innovative health care facilities, a 400-slip marina, and retail stores and gas stations. *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* 991-92 (Veronica E. Velarde Tiller ed., 2d ed. 2005). The Tribe contributes millions of dollars each year to Tacoma and smaller non-Indian cities within the reservation, and it donates additional funds to area nonprofits.[9]

Having a core part of Tacoma within the Puyallup Reservation does not seem to have hurt the city. After suffering a post-industrial decline until the 1990s, Tacoma is now "experiencing unprecedented growth," becoming a center for private investment, higher education, and the arts. City of Tacoma, "About Tacoma," http://www.cityoftacoma.org/about_tacoma. Recognizing

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[9] *E.g.*, *Puyallup Tribal Impact: Supporting the Economic Growth of our Community*, http://www.jumapili.com/wp-content/uploads/2013/09/www.puyallup-tribe.com_assets_puyallup-tribe_documents_puyallupcommunityreport_2012_web.pdf (describing extensive Tribal donations); *High-energy elder*, The News Tribune (July 7, 2008) (noting that the Puyallup Tribe is one of the largest donors to charity in Pierce County).

the value of its reservation status, Tacoma permanently installed the Puyallup Nation flag in the Tacoma City Council Chambers this summer. Courtney Wolfe, *Puyallup Nation Flag Now a Permanent Fixture in Downtown Tacoma*, South Sound Magazine, Aug. 1, 2018, https://southsoundmag.com/puyallup-nation-flag-now-a-permanent-fixture-in-downtown-tacoma/.

In 2010, the boundaries of the Saginaw Chippewa Tribe's Reservation, which include the City of Mount Pleasant, were affirmed. *See Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010). While settling its boundary dispute, the Tribe negotiated detailed agreements with Michigan, Isabella County, and Mount Pleasant covering child welfare, law enforcement, zoning, land use, natural resources, and taxation. *Id.* at *1. In approving the settlement, the district court lauded the parties for providing "greater certainty and stability for the parties and their constituents." *Id.* at *4. Today, with over 3,000 employees, the Tribe is the largest employer in Isabella County, larger even than Central Michigan University. Middle Michigan Development Corporation, Top Employers, https://mmdc.org/site-selectors/top-employers/. In addition to funding tribal health and welfare programs, the Tribe has distributed over $249 million to schools and local governments since 1994. *Tribe distributes $2,946,602.98 for the 2018 spring 2 percent cycle*, 29(6) Tribal Observer 1 (June 2018), *available at* http://www.sagchip.org/tribalobserver/archive/2018-pdf/060118-v29i06.pdf.

As Tacoma and Mount Pleasant demonstrate, reservation status can be a boon, not a burden. Across the country, tribal nations are working with states, municipalities, and private entities to build better economies and communities. This cooperation does more than resolve legal uncertainty; it ensures that by working together, governments can improve services and opportunities for all of their citizens.

B. Affirmance Can Improve Law Enforcement on the Creek Reservation.

Reservation status does change criminal jurisdiction in certain cases, but change is badly needed. Oklahoma has one of the highest violent crime rates in the country, and Tulsa has one of the highest violent crime rates in the State. *See, e.g.*, Federal Bureau of Investigation, *Crime in the United States*, Tables 3, 6 (2016), *available at* https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/violent-crime (publishing data establishing that in 2016, Oklahoma had the fifteenth most violent crime reports in the nation, while Tulsa had the second most violent crime reports within the State). Affirming reservation status will enhance the intergovernmental cooperation already occurring, remove the need to search tract books to determine jurisdiction, and make available much-needed tribal and federal resources.

Oklahoma will continue to play the central law enforcement role within the boundaries of the Creek Reservation. Regardless of reservation status, states

have jurisdiction over non-Indians committing crimes against non-Indians, *Draper v. United States*, 164 U.S. 240 (1896), and victimless crimes. *Solem*, 465 U.S. at 465 n.2. The vast majority of the crimes committed within the Creek Reservation will, therefore, remain under state jurisdiction. *See* Oklahoma State Bureau of Investigation, *Crime in Oklahoma*, 2-5 to 2-14 (2017), http://osbi.ok.gov/publications/crime-statistics (noting that less than eight percent of persons arrested for violent crimes are American Indian).

Affirmance, however, makes additional tribal and federal resources available. The federal government can prosecute cases involving Indians throughout the reservation, rather than solely on trust or restricted-fee parcels. 18 U.S.C. § 1153 (jurisdiction over major crimes by Indians); 18 U.S.C. § 1152 (jurisdiction over crimes between Indians and non-Indians). If the defendant is Indian, the Creek Nation may prosecute as well. 25 U.S.C. § 1301(2). While no police force anywhere has enough funding, reservation status will also unlock federal funding sources targeting crime in Indian country. *See, e.g.*, 25 U.S.C. § 5412 (establishing Indian Law Enforcement Foundation); U.S. Dept. Justice, Fact Sheet: Fiscal Year 2018 Coordinated Tribal Assistance Solicitation, https://www.justice.gov/tribal/page/file/913416/download (describing over $823 million in grants to address Indian country crime).

Recognizing Creek law enforcement authority on the reservation will also further Congress's position that "tribal justice systems are often the most appropriate institutions for maintaining law and order in

Indian country." Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Title II, § 202(a)(2)(b), 124 Stat. 2258. Accordingly, Congress has enhanced tribal criminal jurisdiction twice in recent years. *Id.* at §§ 213, 233-234; Violence Against Women Act Amendments of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54. The federal Indian Law and Order Commission similarly concluded that tribal governments are the institutions "best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States*, at v (2013). Affirmance will further this federal policy.

Studies of Public Law 280 provide evidence of the positive impact of affirmance. Today, criminal jurisdiction on the Reservation outside trust lands and restricted allotments in Oklahoma is analogous to that in P.L. 280 states, where states have primary criminal jurisdiction over reservation Indians. *See* 18 U.S.C. § 1162. While one might assume that uniform state jurisdiction would make law enforcement easier, the Indian Law and Order Commission found that P.L. 280 reservations actually face more problems from "institutional illegitimacy and jurisdictional complexity" than other reservations. *Roadmap*, *supra*, at 11-13. A more targeted study found that P.L. 280 reservation residents rated police less available, slower in response time, culturally insensitive, and less able to provide community policing than those on non-P. L. 280 reservations. Carole Goldberg et al., *Final Report: Law*

Enforcement and Criminal Justice under Public Law 280, 112, 476-79 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf.

Meanwhile, a growing body of evidence demonstrates that delivery of governmental services to tribal members is enhanced when tribes are able to take control over such programs themselves. *See, e.g.*, Rupinder Kaur Lægha & Douglas Novins, *The Role of Culture in Substance Abuse Treatment Programs for American Indian and Alaska Native Communities*, 63(7) Psychiatric Servs. 686, 691 (2012) (concluding that tribal culture "should be integrated into substance abuse prevention and treatment" to improve its efficacy); Alyce S. Adams et al., Governmental Services and Program: Meeting Citizens' Needs, *Rebuilding Native Nations: Strategies for Governance and Development* 223 (2007). The Creek Nation is particularly poised to be an effective partner in reservation law enforcement, possessing a robust police force, sophisticated judicial system, numerous prevention and rehabilitation programs, and cross-deputization agreements with the United States, Oklahoma, and local governments throughout the Reservation.

In addition, because the area is already interspersed with trust land and restricted allotments, reservation status eliminates the need for "law enforcement officers . . . to search tract books in order to determine . . . criminal jurisdiction over each particular offense." *Seymour*, 368 U.S. at 358. Amnesty International found that this process contributes to the crisis of sexual violence against Native women. According to Amnesty's

2007 Report, "[i]n Oklahoma, confusion around jurisdictional boundaries means it is not always immediately clear whether a case should be prosecuted by a tribal prosecutor, a federal prosecutor or a state prosecutor . . . [C]ourts may take years to determine whether the land in question is tribal or not." Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 62 (2007). Removing this jurisdictional uncertainty should allow more effective policing and more timely justice.

In short, reservation status, by enhancing tribal, state, and municipal cooperation, and increasing law enforcement resources, could improve law and order for all concerned.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND ADDITIONAL ADVOCACY ORGANIZATIONS FOR SURVIVORS OF DOMESTIC VIOLENCE AND ASSAULT IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

As a national organization working to end domestic violence and sexual assault against Native women and children, the National Indigenous Women's Resource Center ("NIWRC") understands the significance of the Tenth Circuit's conclusion that the Muscogee (Creek) Nation's ("Creek Nation") Reservation remains a "reservation," and therefore constitutes "Indian country," under 18 U.S.C. § 1151(a).

In reauthorizing the Violence Against Women Act in 2013 ("VAWA 2013"), Congress tethered its restoration of tribal criminal jurisdiction to lands that constitute "Indian country." VAWA, Pub. L. No. 113-4, title IX, § 904(a)(3), 127 Stat. 120 (March 7, 2013) (codified at 25 U.S.C. § 1304(a)(3)). Thus, because the lands within a Tribal Nation's borders—its "reservation"—constitute "Indian country" under § 1151, a judicial decision disestablishing a Tribal Nation's reservation would effectively preclude that Nation from fully implementing VAWA's restored tribal jurisdiction. For instance, if this Court were to declare the Creek Nation's Reservation "disestablished," the Creek Nation's ability to prosecute a non-Indian engaged in an act of domestic violence or dating violence within its territorial jurisdiction would be severely truncated.

Should this Court accept Petitioner's invitation to depart from its long-settled diminishment framework,

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On July 31, 2018, counsel for Petitioner and Respondent informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

then, such a decision could preclude the Creek Nation (and potentially other Tribal Nations) from fully utilizing the jurisdiction Congress has restored. The NIWRC *Amici*, therefore, offer a unique perspective on the relationship between Congress's plenary power over Indian affairs, the inherent sovereign authority of tribal governments to prosecute crimes committed against their own citizens, and safety for Native women and children.

The leading signatory, the NIWRC, is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in Tribal Courts, tribal governmental process, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

NIWRC is joined by six additional Tribal Nations that have invested significant resources, time, and effort to ensure that their prosecutions of domestic violence crimes serve to increase the safety of their tribal communities, while simultaneously working to ensure that the rights of the domestic violence defendants in tribal criminal proceedings are respected and enforced.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") is a union of three Tribes—Cayuse, Umatilla, and Walla Walla—located on a 172,000 acre reservation in Oregon. Similar to the Creek Nation, the Umatilla Indian Reservation was

subject to allotment and is heavily allotted. The CTUIR has more than 3,100 members, nearly half of whom live on the reservation alongside approximately 1,500 non-Indians. The CTUIR was the first Tribe in the nation, and the second jurisdiction in the country, after the State of Ohio, to implement the Adam Walsh Act in 2009. In March of 2011, the CTUIR implemented felony sentencing under the Tribal Law and Order Act of 2010 and has since prosecuted numerous felony cases. In July of 2013, the CTUIR implemented all necessary provisions of VAWA § 904's special domestic violence criminal jurisdiction ("SDVCJ"), and was approved by the United States for early exercise of that authority in February of 2014. Since implementing § 904 of VAWA, the CTUIR has prosecuted SDVCJ cases for acts of domestic violence committed by non-Indians against Indian women on the Umatilla Indian Reservation while according those defendants the full panoply of protections called for under VAWA.

The Eastern Band of Cherokee Indians is an Indian Nation located in the mountains of Western North Carolina comprised of the descendants of Cherokees who avoided forced removal along the Trail of Tears, or returned from the Indian Territory after the march. About 8,500 Eastern Band Cherokees live on the Eastern Band Cherokee Reservation. On June 15, 2015, the Eastern Band implemented VAWA's § 904's SDVCJ.

The Nottawaseppi Huron Band of the Potawatomi ("NHBP" or the "Tribe") is a federally-recognized American Indian Tribe with more than 1,400 enrolled Tribal Members. The Tribe's Health Center serves tribal citizens, non-NHBP citizen Indians/descendants of other federally-recognized Indian Tribes, and employees who are not tribal citizens and their dependents.

NHBP exercises jurisdiction over Reservation lands upon which the tribal government facilities, residential housing, parks/recreation facilities, and various economic enterprises are found, all within the borders of what is now called the State of Michigan. The Tribe currently prosecutes crimes of domestic violence under the Nottawaseppi Huron Band of Potawatomi Indians Law and Order Code. NHBP has participated in the Intertribal Technical-Assistance Working Group ("ITWG") on Special Domestic Violence Criminal Jurisdiction since its inception and has now implemented VAWA § 904's restored criminal jurisdiction.

The Pascua Yaqui Tribe ("PYT") is a sovereign Tribal Nation and was among the first three Tribal Nations to exercise enhanced jurisdiction under VAWA § 904. The PYT's reservation consists of 2,200 acres situated approximately 10 miles southwest of Tucson, Arizona.

The Pokagon Band of Potawatomi Indians ("Pokagon Band") is a sovereign federally-recognized Indian Tribe with approximately 5,600 enrolled tribal citizens and a ten county service area that includes four counties in Michigan and six counties in Indiana. The Pokagon Band has trust land in Michigan and Indiana and prosecutes crimes of domestic violence under the Pokagon Band's Code of Offenses. The Pokagon Band has participated in the ITWG since the inaugural meeting and intends to implement VAWA's § 904 restored special domestic violence criminal jurisdiction.

NIWRC is also joined by sixty additional organizations that share NIWRC's commitment to ending domestic violence, rape, sexual assault, and other forms of violence in the United States (collectively, the

"NIWRC *Amici*").[2] The depth of the NIWRC *Amici*'s experience in working to end domestic violence renders them uniquely positioned to offer their views on the need for an interpretation of "reservation" and "Indian country" under 18 U.S.C. § 1151(a) that ensures Tribal Nations may continue to exercise VAWA's restored criminal jurisdiction to protect all Native women within their borders as envisioned by Congress.

Because Petitioner's attempt to have the Creek Nation's Reservation judicially declared "disestablished" threatens the safety, welfare, and lives of Native women, the NIWRC *Amici* urge this Court to affirm the Tenth Circuit's conclusion that until or unless Congress does in fact disestablish the Creek Nation's Reservation, the Nation's lands will continue to constitute a "reservation" under 18 U.S.C. § 1151(a).

SUMMARY OF THE ARGUMENT

Today, Native women face the highest rates of domestic violence, murder, and sexual assault in the United States. The majority of these crimes are committed by non-Indians. But since 1978, Tribal Nations have lost the authority to exercise their inherent jurisdiction and prosecute crimes committed by non-Indians on tribal lands. *See Oliphant v. Suquamish*, 435 U.S. 191 (1978). Recently in 2013, however, Congress exercised its authority over Indian affairs and restored Tribes' criminal jurisdiction over non-Indians who abuse Native people on tribal lands.

In 2013, with the knowledge of the extraordinarily high rates of violence perpetrated against Native women, and with the understanding that such violence

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[2] The additional NIWRC *Amici* are identified and listed in the Appendix to this brief.

threatens the continued sovereignty and existence of Tribal Nations, Congress reauthorized VAWA to include an amendment that restores tribal jurisdiction over domestic violence crimes committed by non-Indians (referred to as "special domestic violence criminal jurisdiction" or "SDVCJ"). Pub. L. No. 113-4, 127 Stat. 120 (March 7, 2013) (codified at 25 U.S.C. § 1304).[3]

Congress rendered this restored jurisdiction contingent upon two words: "Indian country." That is, in reauthorizing VAWA, Congress restored tribal jurisdiction over "[a]n act of domestic violence or dating violence that occurs in the *Indian country* of the participating tribe." 25 U.S.C. § 1304(c)(1) (emphasis added). VAWA 2013 states that its use of "[t]he term 'Indian country' has the meaning given . . . in section 1151 of title 18." 25 U.S.C. § 1304(a)(3).

Since the passage of 18 U.S.C. § 1151 in 1948, "Indian country" has consistently referred to lands that include and/or comprise a Tribal Nation's "reservation." Congress took no action to disestablish the Creek Nation Reservation prior to crafting the legal term "Indian country" in 1948, and it has taken no such action since. The State of Oklahoma, however, now asks this Court to conclude that the "territorial boundaries of the Creek Nation no longer constitute an 'Indian reservation' today under 18 U.S.C. § 1151(a)"—even though all parties, including Oklahoma—acknowledge that Congress has

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[3] *See, e.g.*, 159 Cong. Rec. S504 (daily. ed. Feb. 7, 2013) (statement from Sen. Mazie Hirono) ("Specifically, I am concerned about the high instances of domestic violence in Indian Country. I am pleased that S. 47 [VAWA] includes language to provide tribal governments the force they need to prosecute non-Indian perpetrators who commit these crimes on tribal land.").

never taken legislative action to formally disestablish the Creek Nation's Reservation.

Oklahoma instead encourages this Court to disregard the test outlined in *Solem v. Bartlett*, 465 U.S. 463 (1984), and judicially declare the Creek Nation's Reservation obsolete based on arguments and considerations previously rejected in *Solem*. Circumventing *Solem* in this manner, however, would undermine Congress's exclusive authority over the status of reservations, and would ultimately impede Congress's ability to pass legislation in reliance on "Indian country" as defined in § 1151(a).[4]

To be sure, Oklahoma's suggested departure from *Solem* was not the "Indian country" standard intended by Congress when it reauthorized VAWA in 2013. *See* 18 U.S.C. § 1151(a) (Indian Country includes "all land within the limits of any Indian reservation."). When Congress restored a portion of tribal criminal jurisdiction through VAWA § 904, this Court's conclusion in *United States v. Celestine*—that Congress, and only Congress, can disestablish a reservation—controlled;

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[4] As this Court has repeatedly recognized, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [][this Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (internal quotation marks and citations omitted); *see also United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975) (describing Congress's authority regarding Indian affairs as "exclusive"). This Court has likewise recognized Congress's authority over questions of criminal law on tribal lands. *See United States v. Kagama*, 118 U.S. 375, 383 (1886) (affirming that Congress has the authority to "define[] a crime committed" on tribal lands). This Court has consistently upheld the exclusive authority of Congress to legislate as to the legal status of tribal lands and the inherent right of Tribal Nations to exercise jurisdiction over them.

a precedent that has existed since 1909. *See United States v. Celestine*, 215 U.S. 278, 285 (1909) ("[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."). Oklahoma has presented no compelling reason to discard decades of solid precedent. There are none.

To conclude otherwise would undermine Congress's ability to effectuate its trust duties and obligations to Tribal Nations. Congress has repeatedly recognized the connection between tribal sovereignty and safety for Native women as the foundation for the federal government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109–162, § 901(6), 119 Stat. 3078.

Accordingly, the NIWRC *Amici* agree fully with Respondent and the Creek Nation that (1) this Court's decision in *Solem* controls; and (2) a simple application of this Court's precedent in *Solem* results in affirmance of the Tenth Circuit's conclusion that the Creek Nation's Reservation has never been legislatively disestablished. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) ("As with any other question of statutory interpretation," the actual legislative text is "the most 'probative evidence'" of such intent.) (citing *Solem*, 465 U.S. at 470).

Furthermore, because Congress rendered the exercise of VAWA's restored jurisdiction contingent upon "Indian country," any judicial disestablishment of an Indian reservation would significantly endanger the ability of Tribal Nations to exercise this restored jurisdiction and protect their women from domestic violence crimes committed by non-Indians. Many

Tribal Nations have reservations that Congress has never formally disestablished; indeed, many reservations have survived Allotment and Statehood acts,[5] and if those reservations are suddenly at risk of being removed from the category of lands that constitute "Indian country" under § 1151(a) without congressional action, many Tribal Nations could be precluded from exercising VAWA § 904's restored criminal jurisdiction over crimes committed by non-Indian offenders. Such a conclusion would undermine Congress's intent in restoring the inherent right of Tribal Nations to ensure the safety of their women and children citizens living within their borders.

This is not what Congress intended. Instead, when Congress utilized "Indian country" in VAWA 2013 to restore tribal jurisdiction on tribal lands, Congress "recogni[zed] that tribal nations may be best able to address violence in their own communities." S. Rep. No. 112-153, at 32 (2012). But if this Court were to adopt Oklahoma's argument and discard *Solem*'s adherence to Congress's exclusive authority over the

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[5] Courts have repeatedly determined that various reservations survived both statehood and the Allotment Acts, regardless of the chronology of statehood in relation to the Allotment Acts Congress passed from 1878 to 1906. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984) (concluding that the Cheyenne River Sioux Reservation has not been disestablished); *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (concluding that the Omaha Reservation has not been disestablished); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994) (concluding that the Three Affiliated Tribes of Ft. Berthold Reservation has not been diminished); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000) (concluding that the Nez Perce Reservation has not been disestablished or diminished); *United States v. Jackson*, 853 F.3d 436 (8th Cir. 2017) (concluding that the Red Lake Reservation has not been diminished).

disestablishment of reservations, VAWA § 904's reference to "Indian country" would have a much narrower application now, in 2018, than it did when Congress reauthorized VAWA in 2013. Such a conclusion would undermine Congress's carefully crafted remedy enacted in VAWA, and ultimately, would bring dire consequences to Native women and the Tribal Nations who seek to protect them.

ARGUMENT

I. The Current Rates of Violence Against Native Women Constitute A Crisis.

Today Native people, and especially Native women, experience some of the highest rates of violent victimization in the United States.[6] Multiple federal reports have confirmed this reality, and both Congress and the federal courts have acknowledged this disparity.[7] That is, Native women face the highest rates of domestic violence and sexual assault in the United States.[8]

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[6] *See, e.g.* Andre B. Rosay, Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings From the National Intimate Partner and Sexual Violence Survey* 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[7] Congress has also noted these statistics in Findings and Purposes sections of both the Tribal Law and Order Act (124 Stat. 2258) and the 2013 reauthorization of the Violence Against Women Act (Pub. L. No. 113-4, title IX, § 901, 127 Stat. 120). The Executive Branch has acknowledged these data through signing statements, including the reauthorization of the Violence Against Women Act. This data has also been cited in the federal courts. *See, e.g., United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

[8] Nat'l Inst. Of Justice, U.S. Dep't Of Justice, *Full Report Of The Prevalence, Incidence, And Consequences Of Violence Against Women: Findings From The National Violence Against Women Survey* iv (2000), https://www.ncjrs.gov/

Native children also experience higher-than-average rates of abuse.[9] The trauma in tribal communities is so significant that Native youth suffer Post-Traumatic Stress Disorder ("PTSD") at rates equivalent to soldiers returning from the wars in Afghanistan and Iraq.[10]

The most recent reports from the National Institute of Justice include facts that are sufficiently stunning as to be almost incomprehensible. They conclude that more than 4 in 5 Native people have been victims of

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pdffiles1/nij/183781.pdf ("American Indian/Alaska Native women and men report more violent victimization than do women and men of other racial backgrounds . . .").

[9] Att'y Gen.'s Advisory Comm. On American Indian/ Alaska Native Children Exposed to Violence, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Ending Violence So Children Can Thrive* 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf ("American Indian and Alaska Native children suffer exposure to violence at rates higher than any other race in the United States.").

[10] *Id.* at 38, ("[O]ne report noted that AI/AN juveniles experience post- traumatic stress disorder (PTSD) at a rate of 22 percent. Sadly, this is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population.").

violence.[11] Over half (56.1%) of Native women report being victims of sexual violence.[12] Moreover, of all American Indians who have suffered violence, around ninety percent have experienced violence perpetrated by a non-Indian.[13]

The high rates of violence against Native women and children is nothing short of an emergency that threatens the future of Tribal Nations. Widespread, commonplace sexual and domestic violence have taken a toll on Native communities, leaving nations of people that suffer from unspeakable levels of trauma which in turn leads to high rates of maladies such as mental illness, addiction, and even physical ailments such as chronic heart, lung, and liver disease.[14] Victimization, and the unresolved trauma that follows, are directly linked to significant disparities in both mental and physical health.[15] Native women and children also suffer from this high rate of violence in urban areas. For example, a recent study of Native women in

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[11] Rosay, *supra* note 6 at 43-44.

[12] *Id.* at 43.

[13] *Id.* at 46 (Violence is defined as "psychological aggression by intimate partners," "physical violence by intimate partners," stalking, or "sexual violence.").

[14] *See* Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242, 244-45 (2007).

[15] *See* J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Progress in Brain Research 2 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/.

Seattle found that ninety-four percent of Native women surveyed had experienced sexual violence.[16]

As detailed below, Congress has found that the inability of Tribal Nations to prosecute the non-Indians who commit violent crimes against tribal citizens has contributed significantly to the incredibly high levels of violence against Native women on tribal lands today. Although violence against Native women and children traces its roots to the origins of colonial conquest, its continued cultural acceptance is made possible by a legal framework that prevents Tribal Nations from prosecuting a majority of the crimes committed against their women and children.

II. Congress Responded To This Crisis By Restoring Tribal Jurisdiction Over Non-Indian Perpetrated Domestic Violence Crimes In "Indian country."

> *A Nation's character and very survival depend on safeguarding all its people, including the half who are women. The restoration of tribal governments' jurisdictional authority in VAWA 2013 reflects a contemporary Congress committed to removing impediments to the safety of Native women and the jurisdictional security of Native Nations. As our Cheyenne People (Tsistsistas) were instructed long ago: The*

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[16] Urban Indian Health Inst., *Our Bodies, Our Stories: Sexual Violence Against Native Women In Seattle, WA* 4 (2018), www.uihi.org/wp-content/uploads/2018/08/UIHI_sexual-violence_r601_pagesFINAL.pdf.

> *Nation shall be strong, so long as the hearts of the women are not on the ground.*
>
> **Suzan Shown Harjo (Cheyenne & Hodulgee Muscogee), Presidential Medal of Freedom Recipient.**[17]

In 2013, in direct response to this crisis, Congress restored the criminal jurisdiction of Tribal Nations to arrest and prosecute non-Indians who commit crimes of domestic violence, dating violence, or violations of protective orders on tribal lands. *See* 25 U.S.C. § 1304(c). The incredibly high rates of violence perpetrated against Native women focused front and center in both the Senate and House discussions surrounding the 2012-2013 reauthorization of VAWA. For instance, the majority report for the Senate Committee on the Judiciary acknowledged that:

> Another significant focus of this reauthorization of VAWA is the crisis of violence against women in tribal communities. These women face rates of domestic violence and sexual assault far higher than the national average. A regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their lifetimes. A study funded by the National Institute of Justice found that, on some reservations, Native

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[17] Interview with Suzan Shown Harjo, Executive Director, Morning Star Institute, citizen of Cheyenne and Arapaho Tribes (August 13, 2018).

> American women are murdered at a rate more than ten times the national average.

S. Rep. No. 112-153, at 7-8 (2012).[18]

Congress further identified the loss of tribal criminal jurisdiction over non-Indian crimes on tribal lands as a major contributing factor to these incredibly high rates of violence, stating that "[u]nfortunately, much of the violence against Indian women is perpetrated by non-Indian men. According to Census Bureau data, well over 50 percent of all Native American women are married to non-Indian men, and thousands of others are in intimate relationships with non-Indians." *Id.* at 9. Or, as Senator Tom Udall explained:

> Here is the problem: Tribal governments are unable to prosecute non-Indians for domestic violence crimes. They have no authority over these crimes against Native American spouses or partners within their own tribal lands. . . .
>
> Non-Indian perpetrators often go unpunished. Yet over 50 percent of Native women are married to non-Indians, and 76 percent of the overall population living on tribal lands is non-Indian.

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[18] After Congress passed VAWA 2013, the author of the Senate Committee on the Judiciary Report, Sen. Patrick Leahy, acknowledged that "[t]his could not have been done without the leadership and commitment of Senator Crapo and Senator Murkowski, who fought . . . to preserve a fully inclusive reauthorization . . . . In the House, Congressman Tom Cole was a critical voice in calling for the particularly urgent need to address abuse on tribal lands." *Violence Against Women Act Anniversary*, 160 Cong. Rec. S1374 (daily ed. Mar. 10, 2014) (statement of Sen. Patrick Leahy acknowledging bipartisan efforts to restore tribal jurisdiction over non-Indians who commit acts of domestic or dating violence).

> The result is an escalating cycle of violence. On some tribal lands, the homicide rate for Native women is up to 10 times the national average-10 times the national average. . . .
>
> Native women should not be abandoned to a jurisdictional loophole. In effect, these women are living in a prosecution-free zone. The tribal provisions in VAWA will provide a remedy.

159 Cong. Rec. S488 (daily ed. February 7, 2013) (statement of Sen. Tom Udall).

And in the House, Representative Tom Cole noted that Native women, "in many ways [are] the most at-risk part of our population. One in three Native American women will be sexually assaulted in the course of her lifetime. The statistics on the failure to prosecute and hold accountable the perpetrators of those crimes are simply stunning." 159 Cong. Rec. H678-79 (daily ed. Feb. 27, 2013). Representative Sheila Jackson Lee of Texas noted that:

> VAWA Reauthorization closes jurisdictional loopholes to ensure that those who commit domestic violence in Indian country do not escape justice. The bill addresses a gaping jurisdictional hole by giving tribal courts concurrent jurisdiction over Indian and non-Indian defendants who commit domestic violence offenses against an Indian in Indian country.

159 Cong. Rec. E217-03, E218 (daily ed. Feb. 28, 2013) (statement of Rep. Jackson Lee).

In addressing the serious jurisdictional problem in Indian country, Congress explicitly discussed and

referred to *Oliphant* as the constitutional basis for Congress's authority to restore tribal criminal jurisdiction. Representative Gwen Moore of Wisconsin noted that the *Oliphant* Court held "specifically that 'the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.'" 159 Cong. Rec. H737 (daily ed. Feb. 28, 2013) (statement of Gwen Moore referencing Responses To Questions For The Record Of Thomas Perrelli, Assoc. Att'y Gen.) (quoting *Oliphant*, 435 U.S. at 210); *see also* S. Rep. 112-153, at 213 (March 12, 2012) (statement of Senate Comm. on the Judiciary Majority) ("[T]he Supreme Court has indicated that Congress has the power to recognize and thus restore tribes' 'inherent power' to exercise criminal jurisdiction over all Indians and non-Indians. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court suggested that Congress has the constitutional authority to decide whether Indian tribes should be authorized to try and to punish non-Indians.") (citing 435 U.S. at 206–12).

Accordingly, with the aforementioned facts and analysis in mind, in 2013, Congress restored tribal criminal jurisdiction over:

> [V]iolence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

25 U.S.C. § 1304(a)(2); *see also* VAWA, Pub. L. No. 113-4, § 904(b)(1) (stating that "the powers of self-

government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons").[19]

This restoration of tribal criminal jurisdiction over a specific category of non-Indian crimes arose from a "recogni[tion] that tribal nations may be best able to address violence in their own communities." S. Rep. No. 112-153, at 32. But Congress could not restore this jurisdiction by merely defining the categories of covered crimes alone. Because of the complicated history and framework surrounding the intersections of criminal jurisdiction and tribal law, Congress took great care to define precisely *where* tribal criminal jurisdiction over non-Indian domestic violence offenders would be restored.

Congress defined the "where" to be "Indian country," as previously defined in 18 U.S.C. § 1151, "Indian country defined." VAWA § 904(a)(3) states that "[t]he term 'Indian country' has the meaning given the term in section 1151 of Title 18." 25 U.S.C. § 1304(a)(3); *see also* S. Rep. No. 112-153, at 9 (noting that § 904 jurisdiction "covers those offenses when they occur in *Indian country* . . . .") (emphasis added); S. Rep. 112-

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[19] The constitutional authority of Congress to restore tribal criminal jurisdiction over non-tribal citizens was not only confirmed in this Court's decision in *Oliphant*, but also more recently in *United States v. Lara*. *See United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians"); *see also* S. Rep. No. 112-153, at 213 n.23 (2012) ("[T]he Supreme Court has indicated that Congress has the power to recognize and thus restore tribes' 'inherent power' to exercise criminal jurisdiction over all Indians and non-Indians.") (citing *United States v. Lara*, 541 U.S. 193 (2004)).

153, at 10 (stating that "this jurisdictional expansion is narrowly crafted and satisfies a clearly identified need").

Congress selected the term "Indian country" to demarcate where a Tribal Nation could and could not exercise VAWA's restored jurisdiction because "Indian country" is a term that has "a precise meaning under Title 18 of the U.S. Code." 159 Cong. Rec. H795 (daily ed. Feb. 28, 2013) (statement of Rep. Hastings).

Thus, although Congress made clear that VAWA's restored tribal jurisdiction "would not cover off-reservation crimes," *id.* at H738, Congress selected the legal term "Indian country" to be sure that VAWA 2013 would restore tribal jurisdiction over domestic violence crimes occurring on "all private lands and rights-of-way within the limits of *every Indian reservation*." *Id.* at H795 (statement of Rep. Hastings) (emphasis added).

If this Court were to adopt Oklahoma's argument and discard *Solem*'s adherence to Congress's exclusive authority over the disestablishment of reservations, VAWA § 904's reference to "Indian country" would have a much narrower application now, in 2018, than it did when Congress reauthorized VAWA in 2013. Such a conclusion would undermine Congress's constitutional authority over Indian affairs, and ultimately, would bring dire consequences to Native women and the Tribal Nations who seek to protect them.

III. Tribes Are Successfully Implementing VAWA § 904 Across "Indian country" To Protect Native Women From Non-Indian Perpetrated Violence.

To date, at least nineteen Tribal Nations have implemented VAWA § 904's restored tribal criminal jurisdiction and now arrest and prosecute non-Indians who commit domestic violence crimes within their respective "Indian country" reservation boundaries.

A. The Creek Nation Was One Of The First Tribes To Implement VAWA § 904.

> *Ignorance about the feminine role obscures an understanding of half the Creek traditional culture . . . . Without the male force of the fire, life would be weak and blind; but without the earth mother, the water spirit, and the corn woman, all varying forms of the female principle, the stirring of life itself would not be possible. . . . Feminine power is enormous in the Creek view of life . . . .*
>
> **Jean Chaudhuri (Muscogee (Creek) Nation), *A Sacred Path: The Way of the Muscogee Creeks* 48-50 (2001).**

The Creek Nation's 2016 implementation of VAWA's restored jurisdiction is deeply rooted in Creek culture, law, and tradition. The Creek Nation, like many Tribal Nations, has long understood the inherent connection between sovereignty and safety for women.

In the early 1800s, prior to the Creek Nation's forced removal, non-Indian desire for Creek land resulted in

high levels of violence against Creek Nation citizens.[20] As a result, the Creek Nation understood that in order to protect its women and children from such violence, the Nation must exercise its inherent criminal jurisdiction over all perpetrators of violence on Creek lands, including non-Indians.

The Creek Nation, therefore, enacted a series of laws and exercised jurisdiction over non-Indians who engaged in conduct that harmed Creek women—and ultimately, threatened the sovereignty of the Creek Nation. For instance, in 1818, the Creek Nation passed legislation that created legal protections for Creek women who married non-Native men.[21] The law stated: "Should a White man take an Indian woman as a wife and have children by her and he goes out of the Nation he shall leave all his property with his children for their support."[22]

The Creek Nation also has a long history of prosecuting crimes of domestic violence and sexual assault, particularly where women and children are victims. In the early 1800s, long before Oklahoma came into existence, the Creek Nation codified its laws outlawing rape and sexual assault against women on Creek

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[20] Tribal leaders spoke out about these abuses; for instance, in 1764, a Creek leader formally complained to the British that white men were engaged in the sexual exploitation of Native women. *See* Sharon Block, *Rape and Sexual Power in Early America* 3 (2006).

[21] *Laws Of The Creek Nation* (Antonio J. Waring ed., Athens: U. of Ga. Press, 1960). For the original 1818 document, which is part of the D.B. Mitchell papers held by the Newberry Library, *see* David Brydie Mitchell Papers, 1777–1843, bulk 1807-1822, ARCHIVEGRID, https://beta.worldcat.org/archivegrid/collection/data/38867180 [https://perma.cc/ DJ3J-3RMB].

[22] *Laws of the Creek Nation* 120 (Antonio J. Waring ed.).

Nation lands. These written laws were not limited to Creek Nation citizens alone; thus, if a person raped a woman on Creek Nation lands—regardless of whether that person was Indian or not—the Creek Nation had authority to arrest and prosecute the individual who committed the crime. The resulting Muscogee law read:

> And be it farther enacted if any person or persons should under take to force a woman and did it by force, it shall be left to the woman what punishment she Should [be] satisfied with to whip or pay what she say it be law.[23]

As indicated by the use of the term "person" to refer to offenders, as opposed to "citizen," "Indian," or "Native," the law's application was not limited to Muscogee citizens or American Indians. Moreover, the Muscogee law demonstrates a sharp distinction between Anglo-American rape laws in that the victim was to be consulted regarding the proper punishment for the perpetrator who committed the crime against her. No state or federal law during that same time period allowed a woman to participate in the legal system to fashion a remedy for the violent crime she endured.

Following forced removal to Indian Territory, the Creek Nation reconstituted its national and local governments and justice systems, rekindled its ceremonial fires, and continued its efforts to protect citizens from violence. After the Civil War, the Creek Nation ratified a Constitution in 1867, which created six districts within the Reservation itself, extending to the external borders of the 1866 treaty. Well into the late 19th century, the Creek Nation criminal courts maintained a healthy criminal docket, which included

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[23] *Id.*

prosecutions for rape, battery, and other violent crimes.[24]

In 2016, the National Council of the Creek Nation passed NCA Bill 16-038 (the Protection from Domestic and Family Violence Act, "PDFVA"), to "offer victims the maximum protection from further violence that the law can provide." Section 3-102(A). The PDFVA constitutes a comprehensive 67-page law that includes provisions implementing VAWA § 904's restored criminal jurisdiction. The legislative history embedded within the bill indicates that the Creek Nation had been working on the legislation for two years prior to enactment.[25]

To restore its inherent jurisdiction over non-Indian perpetrated domestic violence crimes, and pursuant to VAWA § 904, the Creek Nation defined the scope of its restored "Indian country" jurisdiction as extending throughout its 1866 Treaty reservation boundary. *See* Title 27, Sec. 1-102 of the Muscogee (Creek) Nation Code of Laws. Specifically, the PDFVA states that the Creek Nation's restored jurisdiction "shall extend to all the territory defined in the 1866 Treaty with the United States." *Id.*

Thus, the PDFVA itself, facilitated by VAWA and anticipated by Congress, contemplates a comprehensive reach of territorial jurisdiction, meaning that the

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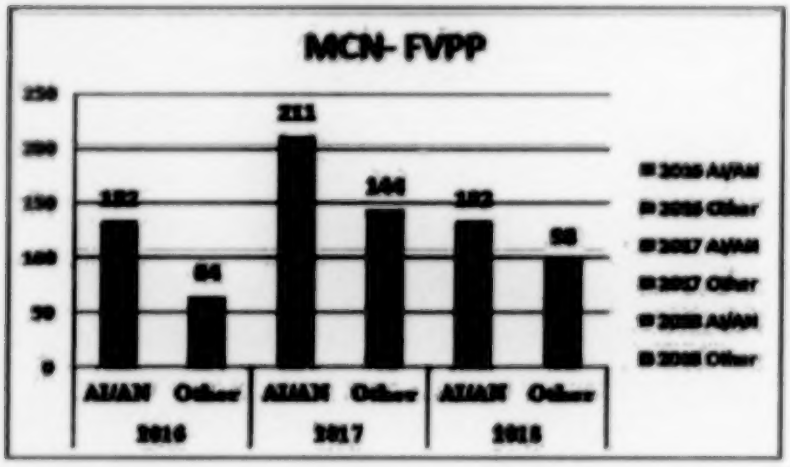
[24] Documents from the Creek Nation courts in the late 19th century were transcribed and codified in 2005. Known collectively as the Mvskoke Law Reporter (Mvskoke Vhakv Oh-Kerkuecv), volumes 5-7 include Creek Nation District Court and the Creek Nation Supreme Court decisions starting in 1870. This Reporter indicates that murder, rape, and assault were prosecuted in all districts.

[25] *See* Sec. 1(D).

Creek Nation has, in its implementation of VAWA 2013, defined VAWA's reference to § 1151's "Indian country" as including the entirety of the Creek Nation's Reservation—a reservation that has never been disestablished by Congress.

Today, Creek Nation's Family Violence Prevention Program ("FVPP") offers services to all Indians and non-Indians living within the Creek Nation's Reservation borders. As the below chart demonstrates,[26] the Creek Nation provides significant assistance to Indian and non-Indian survivors of domestic violence living within the Creek Nation's Reservation borders. For instance, so far in 2018, non-Indians comprise 42.6% of the domestic violence and sexual assault survivors who have received assistance from the Creek Nation FVPP on the Creek Nation Reservation.



[26] Muscogee (Creek) Nation, Family Violence Prevention Program MCN-FVP Chart, *available at*: http://www.mcn-nsn.gov/wp-content/ uploads/ 2018/09/FVPP-Chart-served.png

B. Other Tribal Nations Have Implemented VAWA § 904 With Great Success Throughout "Indian country."

The Pascua Yaqui Tribe ("PYT") was among the first three Tribal Nations to exercise enhanced jurisdiction under VAWA § 904. The PYT has had great success in exercising its restored inherent authority to protect Native women within the Tribe's reservation border, or its slice of "Indian country." The PYT's reservation consists of 2,200 acres situated approximately ten miles southwest of Tucson, Arizona.[27] Indeed, 15% to 25% of the PYT's criminal domestic violence docket consist of cases arising under the restored jurisdiction in VAWA 2013.[28] As of March 2018, there have been forty VAWA 2013-related arrests.[29] The PYT Tribal Courts have taken significant initiative in implementing VAWA with a law enforcement staff of more than twenty-five officers, a newly improved Victim Services Program, and a staff of eight defense attorneys who represent Indian and non-Indian defendants. The majority of VAWA 2013 defendants are in support programs and all are able to access resources made available through the Pascua Yaqui Pre-Trial Services Division.[30] In 2017, the first jury trial conviction of a

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[27] National Congress of American Indians (NCAI), *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* 42 (March 20, 2018), http://www.ncai.org/resou rces/ncai-publications/SDVCJ_5_Year_Report.pdf.

[28] *See id.*

[29] *See id.*

[30] *See* Alfred Urbina & Melissa Tatum, *Considerations In Implementing VAWA's Special Domestic Violence Criminal Jurisdiction And TLOA's Enhanced Sentencing Authority: A Look At The Experience Of The Pascua Yaqui Tribe* 11 (Oct. 2014),

non-Indian defendant under VAWA § 904 occurred in the Tribal Court before a diverse jury representative of the combined Pascua Yaqui citizen and non-Indian community.[31]

The Tulalip Tribes ("Tulalip Tribe"), located west of Marysville, Washington sits on a 22,000 acre reservation, of which only 12,500 acres are held in federal trust status. Roughly 76% of the Tulalip Tribe's total reservation population is non-Indian.[32] On February 20, 2014, the Tulalip Tribe implemented VAWA's restored criminal jurisdiction as one of the first three Pilot Project Tribes. The Tulalip Court operates a separate Domestic Violence Court docket where non-Indian domestic violence cases are handled, along with a specialized prosecutor and Tribal Court Public Defense Clinic in partnership with the University of Washington. Since 2014 implementation, the Tulalip Tribe has had twenty-five VAWA 2013-related arrests with sixteen convictions.[33] All defendants are required to undergo Tribe-sponsored batterer intervention programs.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), located in Eastern Oregon, has a 172,000-acre reservation as well as various treaty-fishing sites held in trust along the Columbia

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http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf

[31] See PR Newswire, *Conviction In Indian Country Prosecuted At Tucson, Arizona's Pascua Yaqui Tribal Court* (May 2017), https://www.prnewswire.com/news-releases/first-non-indian-jury-trial-conviction-in-indian-country-prosecuted-at-tucson-arizonas-pascua-yaqui-tribal-court-300462521.html

[32] *See* NCAI, *supra* note 27, at 44.

[33] *Id.*

River that constitute its "Indian country."[34] It also is among the first three Tribes to implement VAWA 2013 and received early authorization to exercise enhanced jurisdiction on February 20, 2014, along with the PYT and the Tulalip Tribe.[35] Since implementation, the CTUIR has made over thirteen arrests with eight convictions.[36] After 2006, and before VAWA 2013 implementation in 2014, there were only two non-Indian domestic violence cases committed against CTUIR citizens that were reported to police and prosecuted by the United States. Implementation has not only increased prosecutions, it has increased the reporting of non-Indian domestic violence crimes by Indian victims as victims learn that reporting crimes will now result in arrests and prosecutions. VAWA 2013 crimes represent about 27% of all domestic violence criminal cases at CTUIR. All defendants undergo a tribally-run batterer intervention program.

As another example, the Eastern Band of Cherokee Indians ("EBCI"), located in the Great Smokey Mountains in western North Carolina, exercises jurisdiction throughout its portion of "Indian country" on its 57,000-acre reservation. The EBCI has been exercising VAWA's restored jurisdiction since June of 2015, and has, to date, made twenty-five arrests with twelve convictions.[37]

Notably, of the nineteen Tribal Nations that have implemented VAWA, no fewer than fifteen define "Indian country" within their own tribal code to include the entirety of their "reservation" or the

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[34] *Id.* at 45.

[35] *Id.*

[36] *Id.*

[37] *See* NCAI, *supra* note 27, at 51.

entirety of their "territorial" boundary, consistent with a plain reading of 18 U.S.C. § 1151(a). That is, VAWA-implementing Tribes define the scope of their boundaries to include what § 1151 defines to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). And while no two VAWA-implementing Tribes maintain identical codes defining the scope of their jurisdiction, all view their boundaries as consistent with the status of a reservation as defined in § 1151(a)—the hallmark of "Indian country" that Congress utilized in VAWA § 904.

For example, the Tulalip Tribal Code states that "[t]he Tulalip Tribes hereby exercise[] 'special domestic violence criminal jurisdiction' as a 'participating tribe,' as defined within 25 U.S.C. 1304 (2013), subject to applicable exceptions defined therein, in the Tulalip Tribes Domestic Violence Court." Tulalip Tribal Code, Chapter 4.25, § 4.25.040. A "participating tribe" is "an Indian Tribe that elects to exercise special domestic violence criminal jurisdiction over the *Indian country* of that Indian tribe." 25 U.S.C. § 1304(a)(4) (emphasis added). The Tulalip Tribal Code then proceeds to define "Indian country" as "the definition given in 18 U.S.C. § 1151." Tulalip Tribal Code, Chapter 4.25, § 4.25.100.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation implemented VAWA's Special Domestic Violence Criminal Jurisdiction in Title 7 of the Fort Peck Tribes Comprehensive Code of Justice (Fort Peck CCJ), which states in pertinent part:

> The Fort Peck Tribal Court is vested with jurisdiction to enforce this section against any

> person who has committed an act of Dating Violence, Domestic Violence or Violation of a Protection Order against an Indian victim within the *Indian country* of the Assiniboine and Sioux Tribes provided the defendant has sufficient ties to the Fort Peck Tribes.

Fort Peck CCJ, Title 7, § 249(a) (emphasis added). Furthermore, the Fort Peck CCJ specifically defines "Indian country" to have "the meaning given the term in section 1151 of title 18, United States Code." *Id.* at § 249(b)(3).

Additionally, the Nottawaseppi Huron Band of Potawatomi ("NHBP") in Michigan does not specifically cite to 18 U.S.C. § 1151, however, the Tribe quotes the language within § 1151(a)-(c) to define the scope of "Indian country" pertaining to its VAWA implementation. *See* NHBP Code, Title 7, Chp. 7.4, § 7.4-8.

These examples reflect the variety of approaches Tribes have adopted to interpret VAWA § 904's use of "Indian country." If, however, Oklahoma's newfound arguments are incorporated into—or replace—this Court's *Solem* framework, the lands that legally constitute "Indian country" under VAWA § 904 will be thrown into question, placing the ability of Tribal Nations to exercise VAWA § 904's criminal jurisdiction over non-Indian domestic violence offenders in jeopardy.

Such an expansion of the jurisdictional hole left in *Oliphant*'s wake would directly undermine Congress's intent when it crafted the legal remedy embodied in VAWA § 904. *See, e.g.*, 159 Cong. Rec. E217-03, E218 (Feb. 28, 2013) (statement of Rep. Jackson Lee) ("The bill addresses a gaping jurisdictional hole by giving tribal courts concurrent jurisdiction over . . . defend-

ants who commit domestic violence offenses against an Indian in Indian country."); *see also* 159 Cong. Rec. H678-79 (daily ed. Feb. 27, 2013) (Rep. Tom Cole noting that VAWA 2013 was intended to restore "the jurisdictions of tribal courts over non-Indian offenders," as that is what Tribal Nations "need to keep their citizens protected from the scourge of domestic violence").

IV. Departure From The *Solem* Framework Would Undermine Congressional Certainty In Passing "Indian country" Legislation And Would Undermine The Ability Of Tribal Nations To Implement VAWA § 904.

To date, the *Solem* framework has provided a predictable test for Tribes implementing VAWA § 904 and for Congress, as Congress continues to pass legislation that relies on "Indian country" to include extant reservations that Congress has never formally disestablished.[38] Abandoning the *Solem* framework at this time, therefore, would undermine both Congress's exclusive authority regarding Indian affairs and tribal sovereignty. Ultimately, such abandonment of *Solem* would preclude Tribal Nations from fully effectuating

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[38] *See e.g.*, 6 U.S.C. § 601; 10 U.S.C. § 284; 15 U.S.C. § 375(7); 15 U.S.C. § 632; 15 U.S.C. § 1175; 15 U.S.C. § 1243; 15 U.S.C. § 1245; 16 U.S.C. § 3371; 16 U.S.C. § 3377; 18 U.S.C. § 1164; 18 U.S.C. § 1460; 18 U.S.C. § 1151; 18 U.S.C. § 1152; 18 U.S.C. § 1153; 18 U.S.C. § 1154; 18 U.S.C. § 1156; 18 U.S.C. § 3488; 18 U.S.C. § 3113; 18 U.S.C. § 2252; 18 U.S.C. § 2252A; 18 U.S.C. § 2265(e); 18 U.S.C. § 2266; 18 U.S.C. § 2346; 18 U.S.C. § 3242; 18 U.S.C. § 3559; 18 U.S.C. § 3598; 18 U.S.C. § 5032; 21 U.S.C. § 387; 25 U.S.C. § 1304; 25 U.S.C. § 1616e-1; 25 U.S.C. § 1684; 25 U.S.C. § 1903; 25 U.S.C. § 2801; 25 U.S.C. § 3202; 25 U.S.C. § 3653; 25 U.S.C. § 4302; 28 U.S.C. § 543; 28 U.S.C. § 1442; 28 U.S.C. § 1738B; 33 U.S.C. § 1377; 33 U.S.C. § 2269; 34 U.S.C. § 12291; 42 U.S.C. § 608; 42 U.S.C. § 654; 42 U.S.C. § 6945; 42 U.S.C. § 10101(19); 49 U.S.C. § 40128.

the congressional purpose behind VAWA 2013: ensuring safety for Native women.

A. The *Solem* Framework Fundamentally Recognizes The Very Congressional Authority That Forms The Foundation For The Restoration Of Tribal Sovereignty In VAWA 2013.

A departure from *Solem*, effectuated through a judicial declaration that the Creek Nation's Reservation has been disestablished, would undermine Congress's ability to effectively effectuate its exclusive authority over Indian affairs.

This Court has repeatedly, and consistently, affirmed its "respect both for tribal sovereignty [] and for the plenary authority of Congress" over Indian affairs. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). That is, "Indian nations ha[ve] always been considered as distinct, independent political communities . . . ." *Talton v. Mayes*, 163 U.S. 376, 383 (1896) (citation and quotation marks omitted).

Despite a regrettable history of policies that sought to exterminate tribal governments and their citizens, Indian Nations have survived and remain both sovereign and distinct, a "separate people, with the power of regulating their internal and social relations. . . ." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886). One of the attributes of sovereignty that Indian Nations maintain today is the "power to prescribe and enforce internal criminal laws." *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

For instance, in *Lara*, this Court described the authority of Tribes to prosecute and punish individuals who commit crimes on tribal lands as "'inherent.'" *United States v. Lara*, 541 U.S. 193, 204 (2004)

(quoting *Wheeler*, 435 U.S. at 322–23). In discussing the historical context of tribal prosecutions, the *Wheeler* Court explained that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U.S. at 322-23 (internal citation omitted); *United States v. Lara*, 541 U.S. 193, 204 (2004) (affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

Nowhere is this recognized tribal "authority to control events that occur" on tribal lands more critical than in the realm of domestic violence crimes committed against Native women and children. And yet, if this Court accepts Oklahoma's invitation to depart from *Solem* and *Parker* in favor of a new judicially crafted diminishment analysis, the Creek Nation—and by extension many Tribal Nations—could lose a significant portion of the VAWA criminal jurisdiction that Congress restored. Oklahoma's arguments provide no discernible basis for this Court to abandon its well-established precedent honoring and upholding Congress's exclusive authority over Indian affairs and issues related to the establishment and disestablishment of reservations. *Solem*, 465 U.S. at 470 ("[O]nly Congress can divest a reservation of its land and diminish its boundaries.").

Congress's decision to restore tribal criminal jurisdiction over crimes committed in § 1151's "Indian country," therefore, constitutes a constitutional exercise of Congress's exclusive power over Indian affairs—one with which this Court should not interfere. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (The Court has "consistently described

[Congress's authority] as 'plenary and exclusive' to 'legislate [with] respect to Indian tribes.'") (quoting *Lara*, 541 U.S. at 200) (emphasis added).

Indeed, the Federal Government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women" compelled Congress to restore tribal criminal jurisdiction over non-Indian domestic violence offenders in "Indian country." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109–162, § 901(6), 119 Stat. 3078. Congress's considered judgment in this execution of the federal government's trust responsibility should not be disturbed. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011).

B. Judicial Determinations That Certain Reservations Have Been Disestablished Would Jeopardize Tribal Sovereignty And Safety For Native Women.

> *On October 25th, 2008, I was beaten and choked. I remember this date because it was three hours before a tribal council meeting. I attended that council meeting with finger and handprints on my neck from being choked. At the council meeting I kept my head down with my hair pulled forward to try and keep the marks from being seen. It was at that point that I realized the violence didn't just threaten me and my children; it threatened my ability to lead my Nation. No woman should be forced to lead a government that has been stripped of the jurisdiction necessary to protect her people.*

Former Councilwoman Cherrah Giles, Muscogee (Creek) Nation, current President, NIWRC Board of Directors.[39]

When a Tribal Nation cannot protect its women, the entire nation is placed in jeopardy. Women perpetuate the existence of all tribal communities, as they give life to the nation's future citizens and contribute significantly to the nation's self-government, often holding critical leadership positions in many tribal governments. Political integrity is contingent upon the provision of protection for members of the body politic, and consequently, a Tribal Nation cannot maintain its integrity when perpetrators are allowed to escape accountability for the harm they have caused to the community.

Congress recognized the connection between preserving the safety of a woman in her own home and the sovereignty of her Nation, as Senator Mazie K. Hirono of Hawaii stated: "Every citizen of this Nation deserves the safety and security that comes with a peaceful home and safe relationship." 159 Cong. Rec. S504 (daily ed. Feb. 7, 2013) (statement of Sen. Hirono). And as Senator Patrick Leahy of Vermont noted, "[n]o one should be able to get away with domestic violence and rape, not in any community, and not because the victim is a Native American victim in *Indian country*." 159 Cong. Rec. S480 (daily ed. Feb. 7, 2013) (statement of Sen. Leahy) (emphasis added).

As explained above, Congress rendered the restoration of criminal jurisdiction in VAWA contingent upon the location of where the crime is committed, and

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[39] Interview with Cherrah Giles, President, NIWRC Board of Directors, citizen of the Muscogee (Creek) Nation (November 2015).

defined this location to be § 1151's "Indian country." If Nations whose reservations have never been formally disestablished are suddenly excluded from this category, however, they will be left with no restored criminal jurisdiction over domestic violence crimes unless they can establish, beyond a reasonable doubt, that the domestic violence crime they seek to prosecute took place on lands that are held in trust or are in restricted status. Arresting perpetrators and prosecuting domestic violence crimes is already challenging enough, as these cases often involve complex, repetitive fact patterns of actions, violence, and manipulative communications that take place in a myriad of ways and in a myriad of places.[40]

Congress passed VAWA 2013 to address the crisis resulting from a jurisdictional loophole. Any abandonment of the *Solem* framework would place the certainty of "Indian country" in jeopardy, and ultimately, would further expand a loophole that Congress has only sought to fix.

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[40] *See, e.g.*, Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) (articulating the "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

CONCLUSION

If the Creek Nation's Reservation is to be disestablished, it is a task for Congress, and not this Court. The *Solem* framework should not be discarded. The decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of Respondent.

American Indians Against Abuse ("AIAA") is a Wisconsin nonprofit organization incorporated in 1991 (www. aiaawi.org). AAIA is a statewide sexual assault and domestic violence tribal coalition serving Wisconsin's eleven Tribes and member programs by providing education, support, and technical assistance to enhance and strengthen the response to victims of domestic violence, sexual assault, dating violence, and stalking. AIAA's trainings, community awareness, and collaborative events are designed to be reflective of and have relevance to our local, regional, and nationwide indigenous people and culture.

The **Arizona Coalition To End Sexual and Domestic Violence** ("ACESDV") is an Arizona nonprofit organization incorporated in 1980 (www.ace sdv.org). The mission of ACESDV is to end sexual and domestic violence in Arizona by dismantling oppression and promoting equity among all people. ACESDV does this through training and technical assistance, public policy advocacy and systems reforms, direct victim services advocacy, and public awareness and prevention activities.

The **Battered Women's Justice Project** ("BWJP") is a Minnesota nonprofit organization incorporated in 2013 (www.bwjp.org). BWJP is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence ("IPV"). The BWJP promotes systemic change within the civil

and criminal justice systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote safer and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

The **Colorado Coalition Against Sexual Assault** ("CCASA") is a Colorado nonprofit organization incorporated in 1984 (www.ccasa.org). CCASA's mission is to promote safety, justice, and healing for survivors while working toward the elimination of sexual violence. As a statewide coalition, CCASA supports its members, partners, and the broader community through technical assistance, training, information and referrals, educational materials, statewide systems change, and public policy education and advocacy.

Community Against Violence ("CAV") is a New Mexico nonprofit organization formed in 1978 and incorporated in 1980 (www.taoscav.org). CAV serves north central New Mexico, providing prevention programs and direct services to survivors of sexual/domestic violence, child abuse, stalking, and dating violence. Its mission is to foster and support a community free of all forms of sexual and domestic violence. CAV offers a 24-Hour Crisis Hotline for survivors of domestic and sexual violence, legal and

medical advocacy services, emergency shelter and housing assistance, counseling and support groups, children's programs, and community prevention and outreach programs.

End Domestic Abuse Wisconsin is a Wisconsin nonprofit organization incorporated in 1978 (www.endabusewi.org). End Domestic Abuse Wisconsin is a statewide coalition comprised of attorneys, social policy advocates, and experts working to advocate for social and policy change to end domestic abuse.

Faith Action Network ("FAN") is a Washington nonprofit organization incorporated in 1975 (www.fanwa.org). FAN is an interfaith advocacy organization that educates, organizes, and mobilizes people of all faith traditions to take action on the critical social issues of our day. FAN partners with thousands of people and more than 140 faith communities across Washington to promote the common good. They work with other faith leaders to facilitate the Interfaith Network for Indigenous Communities, with special concern for issues of sovereignty and well-being of the 29 federally recognized Tribes as well as non-recognized Tribes in Washington State. Together they seek to build a more just, peaceful, and sustainable world.

The **Family Violence Appellate Project** ("FVAP") is a California nonprofit organization incorporated in 2012 (www.fvaplaw.org). FVAP is a nonprofit organization dedicated to working through the appellate legal system to ensure the safety and well-being of domestic violence survivors and their children. FVAP provides legal assistance to domestic violence survivors at the appellate level through direct representation, collaborates with pro bono attorneys, offers training for legal services providers and domestic violence advocates, and advocates for domestic violence

survivors on important legal issues. FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of domestic violence and their children to obtain relief from abuse through the courts.

The **First Nations Women's Alliance** ("FNWA") is a North Dakota nonprofit organization incorporated in 2008 (www.nativewoman.org). FNWA's mission is to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. FNWA is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in tribal communities.

The **Florida Council Against Sexual Violence** ("FCASV") is a Florida nonprofit organization incorporated in 1986 (www.fcasv.org). FCASV is a statewide organization committed to victims and survivors of sexual violence and the sexual assault crisis programs that serve them. FCASV serves as a resource to the state on sexual violence issues. FCASV hosts a biennial statewide conference and offers many trainings, which bring state-of-the-art information from around the nation to Florida. We provide technical assistance to agencies seeking to improve their services for rape victims, and we provide up-to-date information to the public. By using FCASV's toll free information line, callers can access information from FCASV's resource library or from FCASV's network of national resources. FCASV provides information, assistance and leadership on all aspects of sexual violence, including rape, child abuse, stalking and sexual harassment.

The **Georgia Coalition Against Domestic Violence** ("GCADV") is a Georgia nonprofit organ-

ization incorporated in 1992 (www.gcadv.org). GCADV's mission is to collaborate, advocate, educate, and empower. GCADV envisions a Georgia free of domestic violence. GCADV empowers survivors and the programs that serve them. GCADV educates the public and advocates for responsive public policy. Our strength is in numbers, as GCADV collaborates throughout Georgia to stop domestic violence.

The **Idaho Coalition Against Sexual & Domestic Violence** ("Idaho Coalition") is an Idaho nonprofit organization incorporated in 1980 (www.engagingvoices.org). The Idaho Coalition focuses on gender violence inextricably connected to multiple systemic oppression. The Coalition's vision is to create a world where everyone is valued, everyone is safe, and everyone can thrive. The Coalition's work is to build the capacity of programs, organizations, and systems through learning communities to provide safe, compassionate, trauma-informed, inclusive and accessible services to adolescents and adults and their children exposed to violence and to increase offender accountability.

The **Illinois Coalition Against Domestic Violence** ("ICADV") is an Illinois nonprofit organization incorporated 1978 (www.ilcadv.org). ICADV is a membership organization comprised of local nonprofits that respond to domestic violence victims and their dependents. The organization envisions a statewide community committed to exposing the root causes of domestic abuse and ensuring safety for families by supporting the voices of all survivors. ICADV builds networks of support for and with survivors, and advances statewide policies and practices that transform societal attitudes and institutions to eliminate and prevent domestic abuse.

The **Indian Law Resource Center** ("Center") is a Montana foreign nonprofit legal and advocacy organization first incorporated in 1978 in the District of Columbia (www.indianlaw.org). The Indian Law Resource Center provides assistance to Indian and Alaska Native Nations and other indigenous peoples throughout the Americas who are working to protect their lands, resources, environment, cultural heritage, and human rights. The Center's principal goal is the preservation and well-being of Indians and other Native Nations and Tribes. The Center's Safe Women, Strong Nations project works to end the extreme levels of violence against Indian and Alaska Native women and children and its devastating impacts on Native communities by raising awareness of this issue nationally and internationally, by strengthening the capacity of Indian and Alaska Native Nations and Native women to prevent violence and restore safety to Native women, and by assisting national Native women's organizations and Indian and Alaska Native Nations to restore tribal criminal authority and preserve civil jurisdiction.

Integrated Concepts, Inc. ("ICI") is an Oklahoma corporation incorporated in 2008 (www.iconceptsinc.com). The impetus for ICI was the pervasive need for improved communication and collaboration between not-for-profits, educational institutions, governmental agencies, and business entities. To meet the ever-changing needs of our clients, the ICI team is proficient in a range of facilitation methods and understands problem solving and decision-making models. A thorough understanding of a variety of group methods and techniques and the consequences of misuse of group methods aid ICI in guiding collaborations through complex issues and result in successful projects.

The **Iowa Coalition Against Sexual Assault** ("IowaCASA") is an Iowa nonprofit organization incorporated in 1981 (www.iowacasa.org). IowaCASA is a statewide organization whose mission includes ending all forms of sexual violence and improving the services and responses available to those who have experienced sexual violence. IowaCASA provides a bridge between advocates at sexual assault service programs, statewide policy makers, and federal responses to sexual violence and violence against women. Advocates are trained professionals whose job it is to support those who have experienced sexual violence.

Jane Doe Inc. ("JDI"), also known as the Massachusetts Coalition Against Sexual Assault and Domestic Violence, is a Massachusetts nonprofit organization incorporated in 1998 (www.janedoe.org). JDI is a statewide organization of fifty-six member programs that provide direct services to victims and survivors of sexual and domestic violence. Guided by the voices of survivors, JDI brings together organizations and people committed to ending sexual and domestic violence, creating social change by addressing the root causes of this violence, and promoting justice, safety and healing for survivors. JDI advocates for responsible public policy, promotes collaboration, raises public awareness, and supports its member organizations to provide comprehensive prevention and intervention services.

The **Kansas Coalition Against Sexual and Domestic Violence** ("KCSDV") is a Kansas nonprofit organization incorporated in 1982 (www.kcsdv.org). KCSDV works to increase safety, accountability, and justice while ending sexual and domestic violence in Kansas. The organization is a state-level advocacy voice for survivors and a collaborative network of

programs promoting safe homes, safe streets, and safe communities.

The **La Jolla Band of Luiseño Indians Avellaka Program** ("Avellaka") is a La Jolla Band tribal program created in 2010 with funding from the United States Department of Justice (www.lajollaindians.com). Avellaka's mission is to uphold the La Jolla Tribe's authority as a sovereign Indian nation to protect its women citizens and create the laws, policies, protocols, and advocacy services to address violence against Native women.

The **Maine Coalition Against Sexual Assault** ("MECASA") is a nonprofit organization founded in 1991 (www.mecasa.org). MECASA is organized to end sexual violence in Maine and to support high quality sexual violence prevention and response within Maine communities. MECASA works toward ending sexual violence by initiating and advocating for victim-centered public policy; providing expert training, technical assistance, and resources for providers and partners; funding sexual assault service providers; and informing conversations about sexual violence.

The **Maine Coalition To End Domestic Violence** ("MCEDV") is a nonprofit organization incorporated in Maine in 1977 (www.mcedv.org). MCEDV mobilizes collaborative community action with and on behalf of a statewide network of Domestic Violence Resource Centers to ensure that all people affected by domestic abuse and violence in Maine are restored to safety and that perpetrators are held accountable. MCEDV builds partnerships that promote public policy, education, and systems advocacy to create and encourage a social, political, and economic environment that fosters communities where the diversity, dignity, and

contributions of all are respected and celebrated, and domestic abuse and violence no longer exist.

The **Minnesota Indian Women's Sexual Assault Coalition** ("MIWSAC") is a Minnesota nonprofit tribal coalition and National Tribal Training and Technical Assistance Provider formed in 2001 and incorporated in 2004 (www.miwsac.org). MIWSAC provides training, public awareness, and resources to address sexual violence and sex trafficking. MIWSAC's vision is: Creating Safety and Justice Through the Teachings of Our Grandmothers.

Monsoon Asians & Pacific Islanders in Solidarity ("Monsoon") is an Iowa nonprofit organization incorporated in 2007 (www.monsooniowa.org). Monsoon is a community based organization with a mission to end gender-based violence in the Asian & Pacific Islander communities in Iowa through direct services and violence prevention using community organizing and education. Monsoon was established as a program under the Iowa Coalition Against Sexual Assault in 2003 and separated as a nonprofit in 2007.

The **Montana Coalition Against Domestic & Sexual Violence** ("MCADSV") is a Montana nonprofit organization incorporated in 1986 (www.mcadsv.com). MCADSV is a statewide coalition of individuals and organizations working together to end domestic and sexual violence through advocacy, public education, public policy, and program development. MCADSV's mission is to support and facilitate networking among MCADSV's member organizations while advocating for social change in Montana. Currently, MCADSV represents over 50 programs across Montana that provide direct services to victims and survivors of domestic and sexual violence and their children. In addition, MCADSV's membership includes other

nonprofit and government organizations and individuals (professionals and members of the general public) who are interested in addressing domestic and sexual violence in a way that holds offenders accountable and provides support for the people they victimize.

The **Morning Star Institute** is a national, nonprofit Native rights organization founded in 1984 and incorporated in Washington, D.C. Morning Star is a leader in the development of the Native Peoples' cultural rights agenda, from the protection and repatriation of sacred places, ancestors, sacred objects, cultural patrimony, ceremonies and ceremonial grounds, to the promotion of human rights, including highlighting positive imagery and the esteemed position of Native women and children in Native cultural history, symbology and languages. Morning Star promotes the need for federal entities to protect tribal rights through treaties, existing law and the United Nations Declaration on the Rights of Indigenous Peoples. Morning Star has helped many Native Peoples to regain, co-manage or jointly steward Native sacred places, including lands and waters and their cultural and historical aspects, or otherwise protect sacred places from invasive or unwanted development, damage or any desecration. Since 2003, Morning Star also has sponsored and organized the annual and ongoing National Days of Prayer to Protect Sacred Places.

The **National Alliance to End Sexual Violence** ("NAESV") is a Washington, D.C. nonprofit incorporated in 2001 (www.endsexualviolence.org). NAESV is the voice in Washington for state coalitions and local organizations working to support survivors and end sexual violence. The rape crisis centers in NAESV's network see every day the widespread and devastating

impacts of sexual assault upon survivors including those in tribal communities. We oppose any impediments to survivors receiving justice.

The **National Clearinghouse for the Defense of Battered Women** ("NCDBW") is a Pennsylvania nonprofit organization incorporated in 1987 (www.ncdbw.org). The mission of the National Clearinghouse for the Defense of Battered Women is to secure justice for victims of battering charged with crimes related to their battering and prevent further victimization of such people who have been arrested, convicted, or incarcerated. NCDBW continues to work for justice for victims of battering charged with crimes where a history of abuse is relevant to their legal claim or defense.

The **National Coalition Against Domestic Violence** ("NCADV") is a foreign nonprofit corporation founded in 1978 and incorporated in Colorado in 1992 (www.ncadv.org). It strives to foster a society in which there is zero tolerance for domestic violence by influencing public policy, increasing public awareness of the impact of domestic violence, and providing programs and education that drive that change.

The **National Organization for Women Foundation** ("NOW Foundation") is a Washington, D.C. nonprofit organization incorporated in 1986 (www.nowfoundation.org). The NOW Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. The organization is affiliated with the National Organization for Women, the largest feminist grassroots activist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia.

The **National Urban Indian Family Coalition** ("NUIFC") is a Washington nonprofit organization formed in 2013 and incorporated in 2017 as a public charity (www.nuifc.org). NUIFC is a coalition of 28 urban Indian organizations in 20 states representing over 1.5 million American Indians and Alaska Natives residing in America's metropolitan areas. The purpose of the NUIFC is to provide information, advocacy and resources to urban Indian organizations nationally.

The **Native Alliance Against Violence** ("NAAV") is an Oklahoma nonprofit organization incorporated in 2009 (www.oknaav.org). Through the spirit of respect and cooperation, the NAAV will strive to unify tribal service programs throughout Oklahoma by providing culturally appropriate technical assistance, as well as training and support to eliminate domestic violence, sexual assault, stalking and dating violence. The NAAV strives to restore balance and safety for tribal communities. The NAAV is committed to increasing awareness of sexual assault, domestic violence, dating violence, stalking and human trafficking committed against Native women; enhancing the response to violence against Native women at the tribal, federal, and state levels; and identifying and providing technical assistance to coalition membership and tribal communities to enhance access to essential services to Native women victimized by sexual assault, domestic violence, dating violence, and stalking.

The **Native Women's Society of the Great Plains** ("Coalition") is a South Dakota nonprofit organization incorporated in 2008 (www.nativewomenssociety.org). The Coalition's mission is to promote the safety of Native women. The Coalition is comprised of organizations that provide shelter and services to Native women experiencing violence in their homelands.

New Hope, Inc. ("New Hope") is a Massachusetts nonprofit organization incorporated in 1979 (www.new-hope.org). New Hope's mission is to create communities free from violence and exploitation through prevention education and community collaborations. New Hope also provides services to victims and survivors, including a 24-hour confidential hotline, an emergency family shelter, counseling, legal services, housing assistance, and supervised visitation programs.

The **New Mexico Coalition Against Domestic Violence** ("NMCADV") is a New Mexico nonprofit organization established in 1979 and incorporated in 1981 (www.nmcadv.org). NMCADV has been working to achieve a coordinated local, regional, and statewide response to domestic violence. Coalition members, allies, and supporters are committed to ending domestic violence in New Mexico. The NMCADV provides support services for its member affiliates across the state and referral services for domestic violence survivors.

The **New Mexico Coalition of Sexual Assault Programs, Inc.** is a New Mexico nonprofit organization incorporated in 1984 (www.nmcsap.org). The purpose of the New Mexico Coalition of Sexual Assault Programs, Inc., is to prevent and reduce sexual violence in every area of New Mexico (Indigenous communities, NM/Mexico border areas, rural, frontier, urban) through training, policy, anti-oppression initiatives and funding; to establish evidenced based, trauma informed services to survivors and offenders of sexual violence throughout the state; and to increase the level of expertise among service providers of all disciplines regarding their response to sexual violence. These communities continue to be the top priority for

our services and funds. Social justice in every form informs our mission, goal and activities.

The **New York State Coalition Against Domestic Violence** ("NYSCADV") is a New York nonprofit organization incorporated in 1978 (www.nyscadv.org). NYSCADV works to create and support the social change necessary to prevent and confront all forms of domestic violence. NYSCADV provides training, support, technical assistance and advocacy to local direct service domestic violence programs across New York State. As a statewide membership organization, we achieve our mission through activism, training, prevention, technical assistance, legislative advocacy, and leadership development. We promote best practices and broad-based collaboration integrating anti-oppression principles in all our work.

The **New York State Coalition Against Sexual Assault** ("NYSCASA") is a nonprofit coalition of community-based rape crisis programs located throughout New York State organized in 1987 (www.nys casa.org). NYSCASA strengthens responsive services for sexual assault survivors by advocating for/against policies and practices; providing training, consultation, and resources; supporting rape crisis programs with some pass-through funding; and collaborating with a wide variety of colleagues, professionals, and stakeholders.

The **North Carolina Coalition Against Sexual Assault** ("NCCASA") is a North Carolina nonprofit organization incorporated in 1988 (www.nccasa. org). NCCASA is a statewide alliance working to end sexual violence by providing information, referrals, and resources to individuals, rape crisis programs, and other organizations; training rape crisis advocates and allied professionals; promoting awareness through

education and media campaigns; educating North Carolina legislators; coordinating Sexual Assault Response Teams ("SART") across the state; and assisting colleges and universities in their efforts to address sexual assault through the NCCASA campus consortium.

The **Ohio Domestic Violence Network** ("ODVN") is an Ohio nonprofit organization incorporated in 1988 (www.odvn.org). ODVN is a statewide domestic violence coalition providing training and support to local member programs and promoting positive public policy for domestic violence survivors.

The **Oklahoma Coalition for Reproductive Justice** ("OCRJ"), founded as a 501(c)4 in 2010, is a statewide grassroots coalition of organizations and individuals focusing on the advancement of reproductive health, rights and justice in Oklahoma (www.ocrj.org). OCRJ pursues its mission through legislative advocacy, community outreach and education, and litigation. In pursuing reproductive justice in the state, it is imperative for us to acknowledge that we are on stolen land and that we stand behind and support Indigenous Peoples in their pursuit of respect, justice, equity, inclusion, and recognition.

Oklahoma Indian Legal Services, Inc. ("OILS") is an Oklahoma nonprofit legal aid organization first incorporated in 1981 (www.oilsonline.org). OILS is a statewide organization providing free legal representation to low-income Tribal members living in Oklahoma. The attorneys at OILS provide direct representation in cases that are connected to a person's status as a member of an Indian Tribe. These cases involve the Indian Child Welfare Act, probates for restricted Indian lands, wills for elderly Tribal members who own trust or restricted Indian land,

Tribal housing issues, Tribal sovereignty issues, Tribal court representation and individual rights. Much of OILS' work includes protecting women who are survivors of domestic violence and protecting the interests of minor Tribal children in deprived actions and guardianships where the children have witnessed domestic violence or are survivors of child abuse.

The **Oregon Coalition Against Domestic & Sexual Violence** ("OCADSV") is an Oregon non-profit organization incorporated in 1978 (www.ocadsv.org). The OCADSV's efforts have been directed toward providing technical assistance, training and public education to local crisis centers and communities; engaging in systems advocacy; and supporting multi-disciplinary efforts to develop effective agency protocols. These activities promote the awareness of sexual assault and domestic violence, enhance systemic responses to victims and their families, and support innovative approaches to ending domestic and sexual violence.

The **Osage Nation Family Violence Prevention Department** ("ONFVPD") is an Osage Nation nonprofit organization founded in 2000 (https://www.osagenation-nsn.gov/what-we-do/counseling-center/domestic-violence). ONFVPD's mission is to empower those seeking ONFVPD's services with the tools they need to rebuild their lives and become the strong individuals they were created to be; to effect social change through outreach and education in order to put an end to intergenerational violence; and to partner with state, county, and tribal court systems and law enforcement to hold perpetrators accountable for their crimes.

The **P&S Legal Advocacy, PLLC** ("P&S") is an Oklahoma professional limited liability company incorporated in 2009 (www. pslegalok.com). Since their founding, P&S Legal Advocacy has endeavored to become one of the best small law firms in Oklahoma, both in the courtroom and in the local community. Their wide-ranging areas of practice and size allow the firm to handle the needs of start-ups, large companies, and nonprofits as well as individuals while maintaining a close client relationship and personalized attention. With experience in many practice areas, P&S Legal Advocacy goes beyond providing comprehensive legal services. The attorneys devote the time to learn the nuances and drivers of our clients' businesses nonprofit, agency and personal needs.

The **Seven Dancers Coalition** ("Coalition") is a New York nonprofit organization incorporated in 2009 (www. sevendancerscoalition.com). The Coalition is located in upstate New York, and thus the Coalition's territory straddles the United States and Canadian border. The Coalition is established to bring awareness and prevention on Sexual Assault, Domestic Abuse, Campus Safety, Teen Dating, Stalking and Sex Trafficking. The Coalition's mission is to uplift families of indigenous communities by educating and restoring traditional values with the purpose of strengthening self-confidence and dignity. The Coalition strives for an environment of peace and tranquility in order to heal the damaged spirit.

Survivor Outreach Services is a Little Traverse Bay Bands of Odawa Indians nonprofit organization incorporated in 2012 (www.ltbbodawansn.gov). Little Traverse Bay Bands of Odawa Indians Survivor Outreach Services is designed to assist Native American and non-Native intimate partners who

have/are experiencing domestic violence, sexual assault, stalking, and dating violence.

The **Tewa Women United** ("TWU") is a New Mexico nonprofit organization incorporated in 2001 (www.tewawomenunited.org). TWU believes in strengthening and re-strengthening beloved families and communities to end violence against women, girls and Mother Earth.

The **Tribal Law and Policy Institute** ("TLPI") is a California nonprofit organization incorporated in 1996 (www.TLPI.org). TLPI is organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples. Our mission is to enhance and strengthen tribal sovereignty and justice while honoring community values, protecting rights, and promoting well-being. We strive to help create and support institutions and systems that work toward improving the welfare of Native communities, including future generations, to support tribal sovereignty and autonomy, and to facilitate the empowerment of all Native individuals and communities that have suffered from abuse or abusive historical practices and policies.

The **Vermont Network Against Domestic and Sexual Violence** ("Vermont Network") is a Vermont nonprofit formed in 1986 and incorporated in 1988 (www.vtnetwork.org). The Vermont Network represents its member organizations, which are comprised of local domestic and sexual violence agencies. The Vermont Network supports member organizations and their work with survivors of domestic and sexual violence through policy change, training and technical assistance and large scale social change efforts.

Violence Free Colorado ("Violence Free") is a Colorado nonprofit organization incorporated in 1977 (www.violencefreecolorado.org). Violence Free works with hundreds of organizations and individuals in local communities across the state to prevent and end relationship violence, and support those affected by relationship abuse. They build the capacity of a diverse network of domestic violence and other community-based programs across Colorado to help them effectively assist survivors of relationship violence and their families. Their goal is to improve individual and community health and well-being through statewide visionary advocacy and social change efforts, supporting their members, and informing the public.

The **Virginia Sexual and Domestic Violence Action Alliance** ("Action Alliance") is a Virginia nonprofit organization formed in 1981 (www.vsdvalliance.org). The Action Alliance is a diverse group of individuals and organizations committed to ending sexual and intimate partner violence through community advocacy, offering individual resources, and building diverse alliances across the state.

The **Visioning B.E.A.R. Circle Intertribal Coalition** ("VBCIC") is a Massachusetts nonprofit coalition incorporated in 2014 (www.visioningbear.org). The mission of VBCIC is to prevent domestic and sexual violence in the intertribal communities of the Northeast, which includes Massachusetts, New Hampshire, Vermont, Maine, Connecticut, Rhode Island, and New York. VBCIC provides prevention education, training and technical assistance to all indigenous communities in the Northeast who wish to eliminate interpersonal violence in their tribal and intertribal communities.

The **Wabanaki Women's Coalition** ("WWC") is a Maine nonprofit organization incorporated in 2013 (www.wabanakiwomenscoalition.org). The mission of the WWC is to increase the capacity of tribal communities to respond to domestic and sexual violence and influence tribal, national and regional systems to increase awareness, safety, justice, and healing for all our relations. The WWC's vision is to guide the evolution of systems and policies that reflect our Wabanaki voice on behalf of survivors of domestic and sexual violence; create a technical resource center that affirms Wabanaki cultural values and tribal sovereignty, and empowers tribal service providers to serve, educate and influence their communities in an effective and uniform way; and be recognized as the informed resource for issues on Wabanaki survivors of domestic and sexual violence.

The **Washington Coalition of Sexual Assault Programs** ("WCSAP") is a Washington nonprofit organization formed in 1979 and incorporated in 1980 (www.wcsap.org). WCSAP is a statewide non-profit coalition of agencies engaged in the elimination of sexual violence through education, advocacy, victim services, and social change. WCSAP provides information, training, and expertise to program and individual members who support victims, family and friends, the general public, and all those whose lives have been affected by sexual assault.

The **Washington State Coalition Against Domestic Violence** ("WSCADV") is a Washington nonprofit organization incorporated in 1990 (www.wscadv.org). WSCADV works to improve how communities respond to domestic violence and works to create a social intolerance for abuse by mobilizing member

programs and allies to end domestic violence through advocacy and action for social change.

The **Washington State Native American Coalition Against Domestic Violence and Sexual Assault**, also known as the Women Spirit Coalition ("WSC"), is a private, nonprofit 501(c)(3) charitable organization that was founded in 2002 and is located in the Olympia, WA capital area. WSC is one of 18 Tribal Coalitions nationwide providing a voice for Native women, their families, and communities suffering from epidemic rates of sexual assault, domestic violence, dating violence, stalking, and sex trafficking. WSC is founded, organized, and staffed by Native women. WSC serves 29 Tribes in Washington State. We offer technical assistance, consultation, and training. We provide assistance with program development, proposal review, culturally-based violence prevention and intervention practices, and models of advocacy specific to tribal communities. WSC also provides training on a national level. We serve Indian Tribes in Washington State as a technical assistance provider, trainer and consultant on all matters related to domestic violence, sexual assault, stalking, strangulation, dating violence and sex trafficking.

Wica Agli is a South Dakota nonprofit organization incorporated in 2013 (www.wicaagli.org). Our mission is to reclaim traditional understandings of masculinity and share them with the men and boys in the communities Wica Agli serves. Wica Agli strives to help men value their families and communities above all other things. In sharing the cultural traditions left to men, men can again begin to create communities free of domestic and sexual violence.

Wiconi Wawokiya, Inc. ("Wiconi Wawokiya") is a South Dakota nonprofit organization incorporated in 1982 (www.wiconiwawokiya.org). Wiconi Wawokiya's mission and purpose is to help victims of domestic violence, sexual assault, elder abuse, child abuse and all forms of human trafficking. They do so by providing education and awareness programs to Native communities in order to end all forms of violence.

The **Wisconsin Coalition Against Sexual Assault** ("WCASA") is a Wisconsin nonprofit organization incorporated in 1985 (www.wcasa.org). WCASA is a statewide member organization composed for sexual assault programs, sexual assault survivors and individuals and agencies promoting the social change necessary to end sexual assault. WCASA provides training and technical assistance to 56 sexual assault victim advocacy organizations throughout the State of Wisconsin and other agencies that work directly with victims for sexual assault.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault** ("WCADVSA") is a Wyoming nonprofit incorporated in 1987 (www.wyomingdvsa.org). The WCADVSA is comprised of professionals experienced in providing direct services to victims and survivors, developing primary prevention initiatives, representing victims, training medical and criminal justice professionals, developing curricula, and influencing public policy. The work of the WCADVSA centers around social justice and grassroots efforts, the analysis of the oppression of women and other disenfranchised groups, the values of peer support and policy change, and improving state and national laws.

No. 17-1107

In The Supreme Court of the United States

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE STATES OF NEBRASKA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, SOUTH DAKOTA, TEXAS, UTAH, WYOMING, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

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INTEREST OF AMICI STATES

Oklahoma's criminal jurisdiction in large swaths of the State is not all that hangs in the balance in this case. The precise boundaries of Indian lands carry a host of jurisdictional consequences for Amici States, which exercise jurisdiction on Indian lands that have long been treated as diminished or disestablished but may not satisfy the Tenth Circuit's formalistic approach to determining diminishment or disestablishment.

The Tenth Circuit's departure from this Court's common-sense totality-of-the-circumstances test for determining diminishment or disestablishment of Indian lands under *Solem v. Bartlett*, 465 U.S. 463 (1984), could upend more than a century of settled expectations of state, tribal, and federal jurisdiction in Amici States. For example, in 1854 in Kansas there were at least 14 Indian reservations, all in the most-populous eastern part of the State. Now, there are only four resident federally-recognized Indian tribes within its borders. Opening the door for the remaining tribes to exert jurisdiction within the boundaries of their former reservations because the statutes diminishing or disestablishing those reservations were unclear enough—even though the state and local governments have long exercised unquestioned jurisdiction on those lands—would be confusing and costly at best, and disastrous at worst.

Amici States' interests also extend to civil legislative, regulatory, and adjudicatory jurisdiction in

important areas such as taxation, economic development, energy, public health, and environmental regulation. Their substantial investments in these areas over the last 100 years are threatened by the Tenth Circuit's approach to determining whether Indian lands were diminished or disestablished by Congress.

Given the complex jurisdictional divide at the boundaries of Indian country, Amici States have a vital interest in the stability of those boundaries and a clear understanding of where they lie. The States likewise have an important interest in maintaining a legal test for diminishment and disestablishment that adequately considers all the circumstances surrounding an affected area. The *Solem* framework, when properly applied, is designed to accomplish that goal and yield just and correct answers to boundary dispute questions. Amici States thus have an interest in this Court reiterating that *Solem* is a holistic test, and arresting its slide into a narrow search for particular statutory words of diminishment or disestablishment.

SUMMARY OF THE ARGUMENT

Whether former Indian lands were diminished or disestablished carries enormous practical consequences in areas like eastern Oklahoma and in States where former Indian lands have been under the responsibility, care, and control of state and local governments for more than a century. Although Respondent's claim nominally lies in habeas corpus with respect to his

conviction for capital murder, the relief he seeks will eliminate over a century of Oklahoma criminal and civil jurisdiction over much of that State—precisely the type of disruptive remedy this Court has repeatedly rejected. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 & n.9 (2005).

I.A. Amici States are deeply concerned with the ramifications of the Tenth Circuit's application of this Court's precedents for determining whether an Indian reservation has been diminished or disestablished by Congress. The analytical framework summarized by this Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), requires a holistic, all-things-considered assessment of the circumstances surrounding a possible diminishing event. It weighs not only the text of congressional enactments, but also the contemporaneous understanding of the effect of the act in question and what actually happened in the affected area afterward. The *Solem* test, applied properly, allows for diminishment even where the statutory text is ambiguous, as is often the case.

B. Placing outsized weight on the first *Solem* factor (as the Tenth Circuit did) risks collapsing *Solem* into a narrow search for particular statutory terms to find diminishment. This Court has rejected such a clear-statement rule. *Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("[W]e have never required any particular form of words before finding diminishment."). Such a narrow test risks, as the United States put it at the certiorari stage, "asking the wrong question" in a diminishment analysis. U.S. Br. 6. And asking the wrong

question inevitably will lead to reaching wrong and hugely disruptive answers on critical questions of Indian country boundaries, which in turn create profound jurisdictional problems for Amici States.

C. The wisdom of this Court's adoption of a flexible and comprehensive approach to disestablishment questions is rooted in the Court's recognition that each tribe and set of Indian lands has a unique history that requires case-by-case consideration that is sensitive to that history. The Tenth Circuit's decision illustrates the catastrophic consequences of too woodenly applying the *Solem* factors in a way that downplays the importance of historical context and present-day reality.

II. Amici States have the authority and obligation to exercise civil and criminal jurisdiction over an array of activities within their borders. These include the investigation and prosecution of crimes, the collection of revenue, and the enforcement of health and environmental regulations. Amici States' ability to govern within stable and recognized geographic areas is vital to the public health and safety of the States' residents.

A State's criminal and civil jurisdiction is necessarily complicated when Indian country exists within the State's borders. Within Indian country, tribes—not States—have broad authority to govern their own members. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). And while generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," this

Court has recognized exceptions to that rule. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Those exceptions provide (1) that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

Questions about the application of the *Montana* exceptions, including whether they permit tribal court jurisdiction over tort claims against nonmembers, remain unsettled. *See, e.g.*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016). Complicating matters more is the principle that even on Indian lands over which a tribe's regulatory power would ordinarily be clear, such power may be curtailed by equitable considerations of laches and acquiescence where the tribe has declined to assert its jurisdiction over an extended period. *City of Sherrill*, 544 U.S. at 217-21.

All of this uncertainty and potential disruption cries out for the Court to reject the Tenth Circuit's application of *Solem*, which risks upsetting longstanding

expectations for reservation boundaries with drastic consequences for States.

ARGUMENT

I. *Solem* is an effective analytical framework for determining diminishment or disestablishment *only if* it remains a holistic assessment of *all* the relevant circumstances.

A. The *Solem* framework is meant to guide—but not limit—judicial inquiry on questions of diminishment and disestablishment.

In determining whether Indian lands have been diminished or disestablished, the Court applies a three-part inquiry summarized in *Solem v. Bartlett*, 465 U.S. 463 (1984). The purpose of the *Solem* framework is to determine—based on all the circumstances—whether Congress intended to diminish or disestablish Indian lands, because "only Congress can divest a reservation of its land and diminish its boundaries." 465 U.S. at 470.

As a threshold matter, Amici States note that the parties dispute not only the Tenth Circuit's application of *Solem*, but also whether *Solem* should even govern outside the surplus lands-allotment context. Pet. 29-31 ("*Solem*'s framework was not designed to analyze this situation."); Br. in Opp. 19-21. Petitioner has ably described the limited utility of *Solem* in the unique context of considering the effect of Oklahoma's statehood

on any lingering authority held by the Five Tribes. Amici States' point here is simple: to the extent that *Solem* applies to *any* diminishment or disestablishment question, it must holistically account for *all* relevant circumstances if it is to remain an effective analytical framework that does justice to the "justifiable expectations" of the residents of an affected area. *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

In *Solem*, the Court distilled from its cases a three-factor framework for determining whether a particular congressional enactment caused a reservation to be diminished or disestablished. 465 U.S. at 470-72. First, "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Id.* at 470. Although explicit cession or surrender-of-all-interests language "strongly suggests" congressional intent to diminish or disestablish, *id.*, the Court has rejected a "clear-statement" requirement and has "never required any particular form of words before finding diminishment," *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 471; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 & n.4 (1977).

Second, courts must also look to "the historical context surrounding the passage" of the legislation, if it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Hagen*, 510 U.S. at 411. Probative evidence may include "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports." *Solem*, 465 U.S. at 471. When those sources "unequivocally reveal a widely held, contemporaneous understanding that

the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Id.* But the historical evidence need not be *literally* unequivocal; that is, the State need not show that no person ever expressed a view at odds with diminishment or disestablishment. Instead, the question is whether a common-sense review of the historical record as a whole shows a clear congressional intent to diminish or disestablish. *See, e.g., Rosebud*, 430 U.S. at 591-92, 597-98 & n.20.

Employing this approach, the Court "ha[s] been willing to infer that Congress shared the understanding that its action would diminish the reservation," even if the text of the relevant statutes would suggest otherwise. *Id.* "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act," evidence surrounding its enactment "may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

Third, the Court has also examined events subsequent to the enactment in question to decipher diminishment intent. *Solem*, 465 U.S. at 471. "Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.*

Related to this third factor, the Court has recognized "de facto" diminishment. *Yankton Sioux*, 522 U.S. at 356 (internal quotation omitted); *Solem*, 465 U.S. at 471; *see also* Pet. 232a. The *Solem* Court held that, "[o]n a more pragmatic level," who actually moved onto opened reservation lands is an important consideration when determining diminishment or disestablishment of Indian lands. 465 U.S. at 471. Where non-Indian settlers "flooded" into an affected area "and the area has long since lost its Indian character," the Court has recognized "de facto, if not de jure, diminishment." *Yankton Sioux*, 522 U.S. at 356 (internal quotation omitted). That is because which sovereign actually assumed jurisdiction over an affected area can be "the single most salient fact" in considering an area's jurisdictional history. *Rosebud*, 430 U.S. at 603. That neither a tribe nor the federal government has sought to exercise jurisdiction over an area, "or to challenge [a] State's exercise of authority is a factor entitled to weight as part of the jurisdictional history." *Id.* at 604.

When "an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 U.S. at 471 n.12. And these "'justifiable expectations'" should not be upset by strained readings of relevant congressional enactments. *City of Sherrill v. Oneida Nation of N.Y.*, 544 U.S. 197, 215 (2005) (quoting *Rosebud*, 430 U.S. at 604-05); *accord Hagen*, 510 U.S. at 421 ("jurisdictional history" and "the current population situation

. . . demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" (internal quotation marks omitted)).

The Tenth Circuit has tended to treat the three *Solem* factors as "hierarchical," giving the second and third factors no outcome-determinative weight. *See* Pet. App. 61a; *Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017), *cert. denied sub nom. Northern Arapaho Tribe v. Wyoming*, No. 17-1159, 2018 WL 1023014 (U.S. June 25, 2018). In effect, the Tenth Circuit has interpreted *Solem* to limit the weight given to important historical context and common sense.

But this Court has not treated the *Solem* factors this way. To the contrary, in the foundational cases establishing what would come to be known as the *Solem* framework, the Court described the factors as on equal footing. *Rosebud*, 430 U.S. at 587 ("In all cases, the face of the act, the surrounding circumstances, *and* the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted; emphasis added)); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) ("A congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history." (emphasis added)).

B. Placing near conclusive weight on ambiguous statutory text is anachronistic and short circuits the Court's traditional totality-of-the-circumstances approach to determining diminishment or disestablishment of Indian lands.

Flawed though the policy may have been, allotting and selling Indian reservation lands to Indians as well as non-Indian settlers through surplus land acts and the like reflected Congress's "retreat[] from the reservation concept" toward a policy of "dismantl[ing] the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *Yankton Sioux*, 522 U.S. at 335. Its intent was to "assimilate the Indians by transforming them into agrarians and opening their lands to non-Indians." *Hagen*, 510 at 425; *accord Solem*, 465 U.S. at 466-67.

Around the turn of the twentieth century, Congress shifted from pursuing its forced-assimilation-through-allotment program on a national scale. Instead it turned to dealing with surplus Indian land questions "on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

Against this historical backdrop, the Court has repeatedly explained the fundamental problem with focusing too narrowly on statutory text to discern diminishment or disestablishment:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."

Yankton Sioux, 522 U.S. at 343 (quoting *Solem*, 465 U.S. at 468) (citation omitted).

So in determining whether Congress intended to diminish or disestablish Indian lands, there are *no* "absolutes." *Rosebud*, 430 U.S. at 588 n.4. The "touchstone . . . is congressional purpose"—not any particular *Solem* factor. *Yankton Sioux*, 522 U.S. at 343; *accord Rosebud*, 430 U.S. at 584 ("[T]he face of the Act, the surrounding circumstances, and the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted)). And while the text of relevant statutes is important in determining congressional intent, the text is but one of the factors and should not be interpreted in a way that is inconsistent with contemporary understandings or present, well-settled expectations. *See, e.g.*, *City of Sherrill*, 544 U.S.

at 202-03; *Yankton Sioux*, 522 U.S. at 343-45; *Rosebud*, 430 U.S. at 586-88 & n.4.

City of Sherrill exemplifies this Court's focus on the justifiable expectations of residents in a disputed area. There the Court emphasized the time that had passed since the Indians last owned or occupied the land, the justifiable expectations for regulatory jurisdiction, the disruptive effect on the economy, and the overall demographic character of the area in rejecting the tribe's claim that its recently purchased land was within the historical boundaries of its reservation and thus exempt from taxation. *City of Sherrill*, 544 U.S. at 202-03, 215-19.

Rosebud provides another example of this Court's holistic approach. Instead of isolating the relevant statutory language, the Court looked at the parties' historical understanding of the agreements—including a never-ratified treaty and historical context more generally—to conclude that portions of the Rosebud Reservation were disestablished. *Rosebud*, 430 U.S. at 591-92, 605-06 & n.30. The dissent in *Rosebud* was based on the same premise as the Tenth Circuit's decision—that "the absence of any express provision [of cession] in the Rosebud Acts strongly militates against [disestablishment]." *Id.* at 620 (Marshall, J., dissenting). But the majority rejected that view as "misapprehend[ing] the nature of our inquiry," which required considering the totality of the circumstances. *Id.* at 587-88 & n.4; 598 n.20.

These cases and their progeny confirm that due weight must be given to the second and third *Solem* factors. And the canon of construction that ambiguities in treaties, statutes, and contracts regarding Indian tribes should be "resolved to the benefit of Indian tribes" does not limit the weight courts give to contemporaneous historical context and post-enactment conduct and expectations. *See Yankton Sioux*, 522 U.S. at 349.

The contextual, non-statutory factors account for the fact that the quest for clear statutory language of "cession" searches statutes enacted during a time when the distinction between tribal property ownership and tribal jurisdiction had not yet been conceptualized, either by Congress or by this Court. Congress assumed that the idea of separate tribal-governed lands would be extinct in short order, so it understandably would feel no need to express that assumption in the text of statutes enacted to advance that goal. In the *Solem* line of cases, the Court assumed Congress expected tribal extinction within decades or a generation. *See* 465 U.S. at 468. But in the case of Oklahoma's Five Civilized Tribes, Congress did more than just assume future tribal extinction, it set a date certain within five years of the Creek Allotment Agreement, and could not have imagined it had preserved Indian control over the lands. *See* Pet. 10.

Limiting the influence of historical context, and thus the contemporaneous understanding of ambiguous texts, will too easily lead to a counter-historical finding of no disestablishment where disestablishment

was obvious at the time and observed in practice by all parties ever since. *Yankton Sioux*, 522 U.S. at 343-44; *see also id.* at 346 (emphasizing the importance of viewing statutes in light of the "common understanding at the time: that tribal ownership was a critical component of reservation status").

C. Each set of Indian lands has a unique and complex legal history, and the determination of whether particular lands have been diminished or disestablished must be flexible enough to account for those differences.

Exemplifying the need for a holistic and flexible test is the sheer diversity among the histories of the various Indian lands across the United States. As even a brief survey shows, the cases involving these lands each come with their own characteristics, legal history, and varying degree of clarity and specificity in their governing texts.

Since 1962, the Court has considered at least seven cases involving the classic diminishment situation—where the question is whether a reservation has been diminished by a surplus land statute opening lands for non-Indian settlement: *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Courts*, 420 U.S. 425 (1975); *Mattz v.*

Arnett, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).

And in each of these cases the Court has recognized the importance of the unique historical context of the statutes in question. Yes, this Court has attempted, where possible, to categorize the surplus land acts as being either a "sell and dispose" act, a "restore to the public domain" act, or an express "cession" act. *See, e.g.*, *Parker*, 136 S. Ct. at 1079-80. These labels have helped provide some consistency in how the Court treats similar surplus land acts. For example, in *Hagen* the Court said that "a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, . . . establish[es] a nearly conclusive presumption that the reservation had been diminished." 510 U.S. at 411. And in *Solem* the Court held that "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unalloted opened lands." 465 U.S. at 470. But the categorical labels the Court assigns to different types of enactments do not—and should not—alone control this Court's decisions. *Rosebud*, 430 U.S. at 598 n.20, 603.

City of Sherrill is a great example of why this Court has rejected a rigid approach to determining diminishment or disestablishment based on statutory text without context. The Oneidas had a reservation established in a treaty with the federal government, but throughout the early nineteenth century sold most of what remained of their lands to New York State and

non-Indians. *City of Sherrill*, 544 U.S. at 203, 205-07, 211. Nearly 200 years later, the Tribe repurchased some parcels on its former reservation areas (then occupied by the 99% non-Indian City of Sherrill, New York), built commercial enterprises on the parcels, and refused to pay property taxes because the parcels were Indian country and thus exempt from State taxation. *Id.* at 211-12. The Court distinguished the case from a classic reservation diminishment situation, *id.* at 215, and ultimately invoked principles of equity to "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

The unique history of the State of Oklahoma, which is at the heart of this case, underscores the importance of maintaining and clarifying this Court's holistic approach to tribal lands cases. The State of Oklahoma was formed in part by merger of the former Indian Territory to which the Five Tribes had been removed decades earlier. *Cohen's Handbook of Federal Indian Law* § 4.07[1] (Nell Jessup Newton et al. eds., 2012 ed.). As Petitioner has ably explained (Pet. 4-12), the reservation disestablishment arose here not from surplus land acts, but from a series of acts culminating in Oklahoma's statehood and the complete displacement of tribal authority in the newly created State. Along the way, Congress systematically "destroyed" tribal government in the region, abolishing tribal courts, "sweep[ing] away" their laws, and providing for "the final disposition" of the Five Tribes' affairs. Pet. 9-11.

In opposing certiorari, Respondent waved off this significant history, arguing simply that "[e]very State arguing for disestablishment or diminishment invokes its own unique history." Br. in Opp. 1. Putting aside the undisputable fact that a comparable statehood event is not featured in *any* of the situations described in *Solem* and its progeny, Respondent's main substantive arguments to overcome Oklahoma history cut against this Court's precedents. Respondent argues that "had Congress intended disestablishment, the textual indicators this Court has looked for were not uniquely unsuitable for Oklahoma." Br. in Opp. 1. Throughout his brief, Respondent refers to the lack of "express" or "hallmark" language of cession. Br. in Opp. 2, 24, 26. Respondent basically argues for precisely the magic-words rule this Court has rejected. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 588 & n.4.

But the diverse history among Indian lands, and the diverse statutory language employed by Congress in dealing with them, are precisely why this Court has rejected a clear-statement rule for diminishment or disestablishment cases. *See Hagen*, 510 U.S. at 410-11 (declining to abandon traditional "examine all the circumstances" approach in the face of variations among surplus land acts). The history summarized in this section and elsewhere in this brief punctuates the need for a holistic analytical framework that seeks to determine Congress's intent with respect to reservation status of the affected lands. In practice, that first means ensuring *Solem* step one examines *all* congressional

acts relating to an affected area in their interrelated context. Pet. 32 (The court of appeals below "missed the forest for the trees" by "parsing each statute seriatim and in isolation, thereby looking for one specific statute with specific terminology."). It also means a reaffirmation of steps two and three as equally weighted factors in the *Solem* framework. Finally, it means that no magic words dictate the outcome.

II. Turning *Solem* into a straitjacket of statutory interpretation will create widespread jurisdictional uncertainty that goes to the heart of Amici States' sovereignty.

Whether Indian lands have been diminished or disestablished historically has not been—and should not be—a search for magic words. Nor should it be treated as an abstract legal question disconnected from reality. If there is a "*practical acknowledgment* that [a] [r]eservation was diminished," *Hagen*, 510 U.S. at 421 (emphasis added), "justifiable expectations" based on the de facto settled status quo "merit heavy weight" and should not be lightly disrupted, *City of Sherrill*, 544 U.S. at 215-16. *See Rosebud*, 430 U.S. at 605 n.27 ("A showing of longstanding assumption of jurisdiction is, in the related area of state boundary disputes, entitled to considerable weight."); *Yankton Sioux*, 522 U.S. at 343-44 (emphasizing the importance of viewing statutes in light of the common understanding at the time of enactment and established present-day expectations).

Abiding by the Court's traditional, all-things-considered approach to determining whether Indian lands have been diminished or disestablished is essential to respecting settled sovereign expectations. Moving toward a more formal approach of interpreting statutes of a bygone era based on modern policy preferences (as the Tenth Circuit did), would significantly disrupt the justifiable expectations of those living within the historical boundaries of the Creek Nation reservation and would send a tsunami of uncertainty and jurisdictional litigation through Amici States. *See, e.g.*, *City of Sherrill*, 544 U.S. at 214, 216 (denying the Oneida Indian Nation the "disruptive remedy" of "rekindling the embers of sovereignty that long ago grew cold").

Although Respondent's claim to habeas relief is based on 18 U.S.C. § 1151, which "on its face [is concerned] only with criminal jurisdiction," it also "applies . . . to questions of *civil* jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1974) (emphasis added). And the questions of civil jurisdiction run the gamut: from taxing and zoning laws, to health and environmental regulations.[1] The scope of

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[1] Some of the Amici States have federal statutory authority to exercise criminal jurisdiction over offenses committed by or against Indians on Indian lands. *See, e.g.*, 18 U.S.C. § 1162 (P.L. 280) (conferring "jurisdiction over offenses committed by or against Indians in the areas of Indian country"); 18 U.S.C. § 3243 ("Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."). Nebraska has "retroceded" much of this grant of

legislative or regulatory jurisdiction, in turn, sets the outer limit of tribal-court adjudicatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." (internal quotation marks omitted)).

The prospect of resurrecting long unrecognized reservation boundaries raises the specter of countless state, tribal, and federal jurisdictional questions that lack clear answers. *Compare, e.g., Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (permitting tribal sales taxes on nonmember businesses within the reservation because the "power to tax members and non-Indians alike is . . . an essential attribute of such self-government"), *with Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (seeking to reconcile several prior decisions and holding that "[a]n Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land"); *see also, e.g., Negonsett v. Samuels*, 507 U.S. 99, 102 (1993)

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jurisdiction back to the federal government. It is mainly the implications for civil regulatory and adjudicatory jurisdiction that have the Amici States concerned. Indeed, even P.L. 280 offers little on this score because, as the Court held in *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 383 (1976), the statute's grant of civil jurisdiction "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." Thus, "Public Law 280," which granted some states criminal jurisdiction over Indians within Indian country, 18 U.S.C. § 1162(a), is not a grant of "general civil regulatory authority" to the States. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08 (1987).

(discussing "complex patchwork" of federal, State, and tribal law governing criminal jurisdiction in Indian country); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding in splintered opinions that the tribe could limit some uses of non-Indian fee land through zoning regulations).

Indian tribes are "'distinct, independent political communities'" with residual sovereign power "to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Id.* (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). This includes the "inherent sovereign power to exercise some forms of civil jurisdiction on non-Indian fee lands" within the outer boundaries of their reservations. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). To be sure, tribes' legislative, regulatory, and adjudicatory authority are broadest when exercised over tribe members' activities on tribal land, and rather limited when it comes to exercising jurisdiction over nonmembers' activities within a reservation's borders, particularly when the nonmember's activity occurs on land owned in fee simple by nonmembers. *See Plains Commerce Bank*, 554 U.S. at 328 (describing the "general rule" that "restricts tribal authority over nonmember activities taking place on the reservation, [which] is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians"). *But see, e.g., Kerr-McGee*, 471 U.S. 195; *Brendale*, 492 U.S. at 441-44 (opinion of Stevens, J., announcing judgment in No. 87-1622, concurring in judgment as to Nos. 87-1697 and 87-1711).

But a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565-66. A tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

Although the precise breadth of the *Montana* exceptions remains unsettled, Amici States take some comfort in the Court's recent cases, which emphasize that these two "exceptions" to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" are very "limited." *See Plains Commerce Bank*, 554 U.S. at 329-30; *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). But it is rather cool comfort. Tribal authority in various areas—including the authority to tax, *see, e.g.*, *Kerr-McGee*, 471 U.S. 195; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); impose zoning restrictions, *Brendale*, 492 U.S. at 444 (opinion of Stevens, J.); and regulate natural resources, *see, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (approving tribal licensing requirements for hunting and fishing on tribal land); *Montana*, 450 U.S. at 566 (tribe lacks authority to regulate nonmember hunting and fishing on non-Indian fee land)—have all been repeatedly litigated under the two *Montana* exceptions, yet there still seem to be more questions than answers. *Cf. Dollar Gen. Corp. v. Mississippi Band of*

Choctaw Indians, 136 S. Ct. 2159 (2016) (affirming judgment below by an equally divided court on question of scope of *Montana* exceptions in context of tort claims against nonmembers).

In some of these areas confusion and conflict will come from overlapping regulation by multiple sovereigns. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (permitting duplicative state and tribal severance taxes). In others, technical questions of statutory drafting, regulatory considerations, and impact on tribal self-governance will create the jurisdictional turmoil. *See, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) ("[A] State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.").

And this is to say nothing of tribal health and environmental regulations that could conflict with State and local regulations. *See Montana*, 450 U.S. at 565-66 (tribes "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the *health and welfare* of the tribe" (emphasis added)). While *Plains Commerce Bank* has established a high bar for this exception's applicability, its scope in any particular situation can, and likely will, produce significant, resource-depleting litigation. 554 U.S. at 341 (citing favorably a treatise which observed "'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences'").

Applying *Solem* in a way that is less sensitive both to the reasonable expectations when Indian lands were sold more than a century ago and to settled expectations now, as Respondent no doubt will advocate, will "rekindl[e] embers of [tribal] sovereignty" and inter-sovereign jurisdictional conflict "that long ago grew cold," at great cost to Amici States and their residents who live and work on former tribal lands. *City of Sherrill*, 544 U.S. at 214.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Oklahoma Independent Petroleum Association ("OIPA") represents more than 2,200 independent oil and natural gas operators in the state of Oklahoma, as well as a number of oilfield service companies that provide important support to exploration and production activities.[1]

Many of OIPA's members operate within the historical boundaries of the Indian nations traditionally referred to as the Five Civilized Tribes—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. The Tenth Circuit's decision, which held that the land within the 1866 boundaries of the Creek Nation's tribal fee is now a "reservation," threatens to render all the land within the historical boundaries of the Five Tribes—the eastern half of Oklahoma—"Indian country" under 18 U.S.C. § 1151.

The designation of this huge tract of land as Indian country does far more than replace state criminal jurisdiction with federal criminal jurisdiction. It could subject business owners to tribal taxes, exempt tribes and their members from state taxes, subject non-Indians to tribal land-use regulations, affect the alienability of oil and gas leases, and dramatically change the environmental

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[1] The parties in this case received timely notice under Rule 37.3(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

regulation of oil and gas wells—all of which has far-reaching implications for OIPA's members.

SUMMARY OF ARGUMENT

I. The Tenth Circuit assumed that the Creek lands constituted a "reservation" under 18 U.S.C. §1151, but that was incorrect. A "reservation" is federally-owned land merely "reserved" for tribal occupancy—but the communal lands of the Creek Nation were owned by the Nation itself pursuant to a single fee patent.

A "reservation" under Section 1151 is land "belonging to the United States" which is "reserved from sale and set apart" for a tribe. *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The tribe does not own the "reservation" land, and it depends on federal ownership for a "right [that] amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945).

But because the Five Tribes *owned* their land in fee simple, their territory was not a "reservation" of federal land under Section 1151(a). The Tribes' unique control of their territory extended beyond their ownership arrangement, and included the Tribes' "almost independent government" over their lands. *Atl. & P R Co v. Mingus*, 165 U.S. 413, 437 (1897). Thus, prior to statehood, this Court explained that the Five Tribes' territory "stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered as an independent country." *Id.* at 435–36; *id.* at 435 ("it is open to serious doubt whether that large tract of land [in future Oklahoma], known distinctively as the 'Indian Territory,' is a territory of the United States," as that term was used by Congress).

Through Oklahoma's acceptance into statehood, Congress extinguished this unique relationship and ended the Indian territory's status as a nearly "independent country." The communal tribal fees—which the Government had guaranteed to the Tribes to enjoy and govern in common—were severally allotted to individuals, the Tribal courts were abolished, and Oklahoma law was applied throughout the former Indian territory. After statehood, the members of the Creek Nation and other Tribes were "full fledged citizens of the State of Oklahoma" and, like other state citizens, subject to its "police protection" and criminal jurisdiction. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608–09 (1943).

II. Even if the Creek lands were a "reservation" under Section 1151, Congress explicitly disestablished it in the run-up to statehood.

The Tenth Circuit misinterpreted this Court's disestablishment cases as requiring a "hierarchical, three-step framework" under which "particular language" is given talismanic importance (Pet. App. 61a, 97a)—but the Court has rejected such an approach that "erroneously seizes upon several factors and presents them as apparent absolutes." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977). Rather, the relevant inquiry is whether Congress intended to transfer "Indian country" to state jurisdiction, which must be discerned from the entire course of congressional action, not from the talismanic invocation of a few statutory words. *See id.* at 586 ("The underlying premise is that congressional intent will control.").

Here, there is no doubt that Congress's intent was to place the Indian territory under Oklahoma's jurisdiction. The deliberate allotment and

extinguishment of the tribal fee, imposition of Oklahoma law, and extension of Oklahoma's jurisdiction all effectuated Congress's express purpose: "the extinguishment of the national or tribal title to any lands within that Territory . . . so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State . . . which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.

III. Oklahoma's longstanding exercise of jurisdiction over the Five Tribes territory both "demonstrates a practical acknowledgment" that the Indian territory is no longer "Indian country," and shows that "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421.

Oklahoma has exercised jurisdiction and control over the Indian territory for over a century, fostering the growth of numerous businesses and industries—including the oil and gas industry. Replacing Oklahoma's sophisticated regulatory regime with tribal and federal regulation would impose confusing and overlapping tax regimes, a patchwork of varied environmental regulations, and new and possibly inconsistent licensing and zoning regimes. And—perhaps worst of all—the uncertainty surrounding the shift in regulatory authority would spawn near-endless litigation.

To avoid the destabilizing consequences that will inevitably flow from the Tenth Circuit's erroneous decision, this Court should reverse.

BACKGROUND

The term "reservation" has long referred to federally owned land "reserved" for a tribe. Although

a tribe had an equitable right of usage and occupation on a reservation, it did not *own* the land. *See Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945) ("Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy."); *United States v. Cook*, 86 U.S. 591, 593 (1873) ("The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.").

However, the Five Civilized Tribes—including the Creek—held *legal title*, in fee simple, to the land that they occupied and governed. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). As this Court explained in a decision issued shortly after Oklahoma statehood, the title itself was guaranteed by treaty:

> Pursuant to treaty provisions . . . , the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, *vesting title in them as a tribe*, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them.

Woodward v. De Graffenried, 238 U.S. 284, 293–94, (1915) (emphasis added). Rather than "the usual Indian right of occupancy with the fee in the United States," "[t]he Creek Tribe had a fee-simple title" that "was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." *United States v. Creek Nation*, 295 U.S. 103, 109 (1935).

As reflected in the treaties between the Creek Nation and the United States, the Nation's territory

was defined by its fee patent. *See Creek Nation*, 295 U.S. at 105–06 (defining Creek lands by boundaries of the fee). In the 1832 treaty forcing the Creeks to move west, the government promised it would protect the "Creek country west of the Mississippi" by "caus[ing] a patent or grant to be executed to the Creek tribe." Treaty of March 24, 1832, 7 Stat. 366, Art. XIV. In 1833, the United States delineated the boundary lines of this "Creek country," and committed to granting "a patent, in fee simple, to the Creek nation," by which "the right thus guaranteed by the United States shall be continued to said tribe." Treaty of February 14, 1833, 7 Stat. 417, Art. III. This patent finally issued in 1852, which provided that the United States conveyed to the Creek Tribe the treaty tract "[t]o have and to hold . . . so long as they shall exist as a Nation." August 11, 1852 Patent[2]; *see also* Treaty of August 7, 1856, 11 Stat. 699, Art. III (United States "solemnly guarantee[d]" Creek lands "by the same title and tenure by which they were guaranteed" in the prior treaty articles specifically referring to patents, and in the "letters-patent issued" in 1852 itself).[3]

Thus, unlike Indians whose communal rights flowed from the federal "reservation" of public land for their use, the Creeks—and the other Five Tribes—communally occupied, used, and administered land that the Tribes *owned*. *Shulthis v. McDougal*, 170 F.

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[2] Reprinted in Bledsoe, *Indian Land Laws* (1909) § 92, *available at* https://tinyurl.com/ybol8rh7.

[3] When the Creeks were forced to cede the western half of their lands in 1866 as punishment for their alliance with the Confederacy, they did so by "convey[ing]" their fee title to the United States. Treaty of June 14, 1866, 14 Stat. 785, Art. III; *see also id.* Art. VIII (describing the cession as a "sale of Creek lands to the United States").

529, 533 (8th Cir. 1909) ("The legal title stood in the tribe as a political society[.]").[4] Pursuant to their treaty rights, the Tribes exercised uniquely strong control and governance over their fee territories—so much so that the "Indian Territory" in future Oklahoma was "for most purposes . . . to be considered as an independent country." *Atl. & P R Co v. Mingus*, 165 U.S. 413, 436 (1897). Their unique territory was exempted when Congress passed the General Allotment Act in 1887, which effectuated the new nationwide policy of breaking up *federally owned* reservations. *See Woodward*, 238 U.S. at 294–95; *cf. Hagen v. Utah*, 510 U.S. 399, 424 (1994)

But the Five Tribes' communal ownership of their land "presented a serious obstacle to the creation of the state which Congress desired to organize" in Oklahoma, so Congress decided to "extinguish[]" the tribal fees and thereby end the communal relationship. *Choate v. Trapp*, 224 U.S. 665, 667 (1912). "In 1893 the United States, in pursuance of a policy which looked to the final dissolution of the tribal government, took steps toward the distribution and allotment of the lands among the members of the tribe." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 300 (1911). The 1893 Act simultaneously: (1) extended an open invitation to the Five Tribes to allot their lands themselves, and (2) created the "Dawes Commission," which was empowered "to enter into negotiations with the same tribes for the purpose of extinguishing the tribal titles . . . with a view to the ultimate creation of a state or states of the Union to embrace the lands within the territory." *Woodward*, 238 U.S. at 295.

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[4] The other four tribes occupying the "Indian territory" that would become eastern Oklahoma "held similar patents" and owned their tribal land in fee. *Woodward*, 238 U.S. at 294.

By the early 20th Century, the Dawes Commission—and Congress—had prevailed in securing the Tribes' agreement to the destruction of their own territories. *See Woodward*, 238 U.S. at 295–96 (Commission reports "give a complete and interesting history of the efforts made to further the policy of Congress,-efforts beginning in discouragement, but finally crowned with success"). With respect to the Creek Nation, on May 25, 1901 the Commission succeeded in securing Creek accession to an allotment plan called "the Original Creek Agreement," which was superseded in 1902 by the "Supplemental," and final, Creek Agreement. *Id.* at 312. These agreements were effectuated, and by the time of statehood, "the enrolment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued." *Choate*, 224 U.S. at 670.

Tribal authority over the allotted land terminated and was replaced by state jurisdiction: "As soon as the title, both legal and equitable, to the land in question became vested in [the Creek allottee], it was subject to taxation by the state and county authorities, and [the allottee] had full dominion over the same, notwithstanding in many respects the government still retained a guardianship over him." *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913), *aff'd*, 235 U.S. 72, 35 (1914).[5] Thus, the fee territories of the Creeks and the other Five Tribes were dismantled pursuant to their own consent, clearly abrogating the

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[5] Allotments were originally subject to some time-limited restrictions on alienation and taxation, but "after the trust period had expired and both the legal and equitable title had fully vested in the allottee," the land was thereafter under taxation and jurisdiction of "the state and local municipalities." *Bartlett*, 203 F. at 412.

earlier treaties "solemnly guarantee[ing]" communal ownership and enjoyment over the fee lands.

ARGUMENT

I. Congress Abrogated the Treaties with the Five Tribes by Allotting Their Fee and Transferring Jurisdiction to the New State

The Creek territory was never a "reservation" as that term is used in Section 1151 of the Major Crimes Act because the Creek Nation owned the land in fee. And whatever Indian country status the territory may have had was terminated by and through statehood, as Congress invested Oklahoma with full jurisdiction over the former Indian territory, and "passed laws under which [Five Tribes] Indians . . . bec[a]me full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 608 (1943).

A. The Creek Territory Was Not a "Reservation" Under Section 1151

The term "reservation," as used in Section 1151 and in earlier Supreme Court decisions, refers to land "reserved" for Indian use but *owned* and ultimately administered by the federal government. The Creek Nation's land, by contrast, was owned by the Tribe itself and independently administered pursuant to this unique arrangement—and was thus not a "reservation" as that term is used in Section 1151.

Interpreting the term "reservation" in Section 1151, this Court explained that "'[f]rom an early period in the history of the government it [was] the practice of the President to order, from time to time,

. . . *parcels of land belonging to the United States* to be *reserved* from sale and set apart for public uses.'" *Hagen*, 510 U.S. at 412 (quoting *Grisar v. McDowell*, 6 Wall. 363, 381 (1868)) (emphasis added). "This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, 'when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain.'" *Hagen*, 510 U.S. at 412; *see also Donnelly v. United States*, 228 U.S. 243, 256 (1913) (President could create "reservations" by "setting apart and reserving portions of the public domain in aid of particular public purposes").[6]

Shortly before Section 1151 was passed, this Court equated "reservations" with federally owned land to which tribes have only equitable rights: "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338 (1945); *see also United States v. McGowan*, 302 U.S. 535, 539 (1938) (concluding land was tantamount to a "reservation" when "[t]he government retains title to the lands which it permits the Indians to occupy").[7]

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[6] Section 1151's drafters looked to *Donnelly* when defining the term "reservations." *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276.

[7] The Historical and Revision Notes also list *McGowan* as one of the cases codified by Section 1151. Notes to 1948 Act, following 18 U.S.C. § 1151, p. 276.

By contrast, lands owned *in fee* by a tribe cannot, by definition, be "reserved" federal lands—and thus are not "reservations" under Section 1151.

The statutory text itself makes clear that an "Indian reservation" does not include territory that owes its Indian nature to a patent conveying the fee to a tribe. The statute specifies that a "reservation" is "Indian country . . . notwithstanding the issuance of any patent," ensuring—as the Court has recognized—that "Indian country" includes public land reserved for Indians even if pieces of the reserved land are patented to individual owners. 11 U.S.C. § 1151(a); *see Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962). The "notwithstanding" clause confirms that patented land is an *exception* to the general rule that "reservation" land is non-patented, i.e., that it is federal public land. Indeed, it would make little sense to refer to land issued to a tribe *via patent* as Indian country "*notwithstanding* the issuance of *any* patent."

The Court has long understood that the Five Tribes' patented territory was unique, and that the Tribes' ownership and governance of the land made it unlike any "reservation." In *Atlantic & P.R. Co.*, the Court observed that, given the Five Tribes' unique rights (including both ownership and governance) to the so-called "Indian Territory," "a reference to some of the treaties under which it is held by the Indians, indicates that it stands in an entirely different relation to the United States from other territories,

and that for most purposes it is to be considered as an independent country." *Id.* at 435–36.[8]

The Tribes' special ownership rights and independence had practical consequences: the Court held that a Congressional grant to a railroad of land "through the territories of the United States" was *not* a grant through the Five Tribes' land, because of their unique rights. *Mingus*, 165 U.S. at 435 ("Indeed it is open to serious doubt whether that large tract of land, known distinctively as the 'Indian Territory,' is a territory of the United States, within the meaning of the act."). By contrast, just a decade earlier, the Court had held that an identical grant to a different railroad effectively conveyed ownership to Indian *reservation* lands, because reservation "Indians had merely a right of occupancy,-a right to use the land subject to the dominion and contral [sic] of the government." *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 66 (1886).

Thus, even when the Five Tribes' territory was "Indian country," it was *not* a "reservation" as that term is used in Section 1151.

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[8] The Court explained that the Five Tribes had taken their fee lands and "proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues." *Id.* at 436.

B. The Five Tribes' Territory Ceased to Be "Indian Country" When Congress Allotted the Land and Transferred Jurisdiction to Oklahoma

Whatever "Indian country" status the territory of the Five Tribes had in the 19th Century, that status was extinguished through allotment and statehood.

A territory is considered "Indian country" under Section 1151 when "it ha[s] been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Venetie*, 522 U.S. at 529 (alteration omitted) (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)). The Indians within such "set apart" territory are necessarily separate from state control: "They owe no allegiance to the states, and receive from them no protection." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Further, the *land itself* must be set apart—the Court's "Indian country precedents . . . indicate both that the Federal Government must take some action setting apart the land for the use of the Indians 'as such,' and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Venetie*, 522 U.S. at 531 n.5.[9]

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[9] The Tenth Circuit misunderstood Congress's continuation of the corporate existence of the "Creek Nation" as "recogni[zing] the Reservation's boundaries." Pet. App. 121a. But Congress's continuing recognition of the Creek Tribal *entity* does not show that any *"land in question"* remained Indian country, *Venetie*, 522 U.S. at 531 n.5—particularly in light of the fact that the Act extending the life of the Creek Nation did so to allow the Tribe to wind up its affairs. Blue

Here, Congress clearly intended to eliminate any such Indian community and place "*the land in question*" under the control of the state. By a series of actions continuing through statehood, Congress extinguished the communal fee, invested Oklahoma with full jurisdiction over the former Indian territory, and "passed laws under which [Five Tribes] Indians . . . bec[a]me full fledged citizens of the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 608. Although some time-limited alienation restrictions on *particular* allotments persisted, Congress intended to—and did—ensure that the former Indian territory was not "under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a).

1. Congress's express purpose in creating the Dawes Commission was "the extinguishment of the national or tribal title to any lands within that Territory" held by the Five Tribes "so far as may be necessary . . . to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.

This purpose was clearly effectuated. Quoting from a 1909 Circuit opinion issued shortly after statehood, this Court recognized that the "division of [the Tribe's] property" necessarily ended "the tribal relations" which were based on "ownership in common." *McDougal v. McKay*, 237 U.S. 372, 383 (1915) ("when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue") (quoting *Shulthis*, 170 F. at 534).

Br. at 12; *Talley v. Burgess*, 246 U.S. 104, 107 (1918) (the 1906 Act continuing the Tribal existence, "as its title indicates, is a comprehensive one for the final disposition of the affairs of the Five Civilized Tribes").

"Under treaty stipulations with the United States the Creek Tribe of Indians as a community for a long time owned and occupied large areas now within the borders of Oklahoma and maintained there an organized government," *but* "Congress finally assumed complete control over them and undertook to terminate their government and distribute the tribal lands among the individuals." *McDougal*, 237 U.S. at 380–81. Numerous contemporary cases similarly recognized that Congress acted to extinguish the Five Tribes' communities through allotment of their previously common property and effective termination of their governance over what had been their land.[10]

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[10] *E.g.*, *Wallace v. Adams*, 204 U.S. 415, 419 (1907) ("The case arises out of the legislation of Congress designed *to secure the disintegration of the tribal organization of the Five Civilized Tribes in the Indian territory*, and the distribution of the property of those tribes among the individual Indians.") (emphasis added); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912) ("During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, . . . among their respective members, and to the dissolution of the tribal governments."); *Heckman v. United States*, 224 U.S. 413, 431–32 (1912) (conditions in the Indian territory "led to the enactment of legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property"); *see also Longest v. Langford*, 276 U.S. 69, 69–70 (1928) (agreements "set forth a comprehensive scheme for allotting the lands of the two tribes in severalty among their members, distributing the tribal funds and dissolving the tribes"); *Marlin v. Lewallen*, 276 U.S. 58, 63 (1928) (Creek Agreements "taken together, embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership").

Concurrent with the "extinguishment" of the Tribes' communal title, Congress acted "to enable the ultimate creation of a State," by investing the State of Oklahoma with jurisdictional authority that would "embrace" the Indian territory. In the years leading up to statehood, Congress took steps to dismantle the Five Tribes' authority in the Indian territory, including by abolishing tribal courts and replacing Tribal law with the laws of Arkansas (as Oklahoma, not yet a state, did not have its own laws). *See* Blue Br. at 29–30; *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912) ("Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality").[11]

Although Congress ousted the tribes of legal jurisdiction in the Indian territory, it "did not contemplate that this situation should be of long duration, but, on the contrary, that the territory should be prepared for early inclusion in a state." *S. Sur. Co. v. State of Oklahoma*, 241 U.S. 582, 584 (1916); *see also Shulthis*, 225 U.S. at 571 ("Plainly, [Congress's] action was intended to be merely provisional, and not to encroach upon the powers

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[11] Before the ouster of tribal jurisdiction, "[t]he Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, they then exercised within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge." *Turner v. United States*, 248 U.S. 354, 354–55 (1919).

which rightfully would belong to the prospective state.").

Pursuant to that plan, Congress transferred jurisdictional and legal authority to Oklahoma upon statehood. With the exception of exclusively federal crimes, "all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma territory, or in the United States courts in the Indian Territory" were to be transferred to Oklahoma state court and "proceeded with, held, and determined by the courts of said state." *S. Sur. Co.*, 241 U.S. at 585 (quotations omitted). "In other words, the jurisdiction of the [Oklahoma] state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed." *Id.* at 586. And to ensure that "the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act (section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof,'" thus applying Oklahoma territorial law to the Indian territory upon statehood. *Jefferson v. Fink*, 247 U.S. 288, 292–93 (1918) (quoting Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267); *see also Shulthis*, 225 U.S. at 571–72 (corporation "incorporated in the Indian territory under the Arkansas statutes" was automatically subject to Oklahoma corporate law upon statehood).

Thus, by statehood Congress had divided and extinguished the Tribal fees and granted Oklahoma jurisdiction over the Tribes' former lands as if "the Indian Territory [had] been a state." *S. Sur. Co.*, 241 U.S. at 586; *see also Bartlett*, 203 F. at 412 ("As soon as the title, both legal and equitable, to the land in

question became vested in [the Creek allottee], it was subject to taxation by the state and county authorities"). These actions unequivocally abrogated the United States's treaties with the Five Tribes, which had "solemnly guaranteed" the Tribes' communal ownership and governance over their fee lands, and the exclusion of state control. *See* p. 6, *supra*; *United States v. Dion*, 476 U.S. 734, 739–40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.").

The former territories of the Five Tribes have thus not been "under the jurisdiction of the United States" for well over 100 years. 18 U.S.C. § 1151(a); *see Rosebud Sioux*, 430 U.S. at 604–05. Rather, they have been an integral part of Oklahoma.

2. Congress did not renounce all regulatory authority related to Indians in Oklahoma at statehood—but, as contemporary jurists recognized, its limited intervention did not interfere with Oklahoma's jurisdiction over the former Indian Territory.

While Congress broke up the Tribes' communal fees, it temporarily restricted alienation of some allotments belonging to "full-blood" tribe members. *See Tiger*, 221 U.S. at 302 (discussing 1906 Act).[13] But

[13] Other allotments had also been briefly restricted, but most of these restrictions, to the extent they had not already expired, were terminated in 1908. *Goat v. United States*, 224 U.S. 458, 465 (1912); *see also Joplin Mercantile Co. v. United States*, 236 U.S. 531, 548 (1915) (noting that numerous unrestricted allotments were presumably part of the lands

contemporary jurists did not believe that the limited restrictions on alienability amounted to a preservation of Tribal territory—on the contrary, they were certain that the territory was now under state jurisdiction. In a well-cited opinion, Judge Pollock of the then Circuit Court of Eastern District of Oklahoma explained that the restrictions on alienability coexisted with an explicit Congressional policy of subsuming the Indian territory into Oklahoma:

> it must be borne in mind under existing treaty regulations made between the government and the Creek Nation the Congress possessed full power and authority to so legislate with respect to lands by the government allotted to its wards; that although the members of the Five Civilized Tribes of Indians by the act of allotment under existing laws became citizens of the state, and *the lands thus allotted became a part of that great mass of real estate which on the admission of the Indian Country and Oklahoma Territory as the state of Oklahoma passed under the general control of the laws of the state*, yet the state by the terms of the enabling act under which it was admitted expressly

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"taken out of Indian country," but, by contrast, there was still federal jurisdiction over liquor imports to restricted allotments, as later codified in Section 1151(c)); *see also id.* at 546 (holding Congress gave Oklahoma, *not* the federal government, general criminal jurisdiction over intrastate liquor transactions in the Indian territory, as a different construction "would have interfered to a greater extent with the control of the new state over its internal police").

> consented the general government should reserve to itself and exercise its power of regulation and control over the disposition of such allotted lands to the exclusion of or in conformity with the power possessed by the state over the property of its citizens.

Bell v. Cook, 192 F. 597, 603–04 (C.C.E.D. Okla. 1911) (emphasis added).[13] This Court later agreed with Judge Pollock's view that the time-limited restrictions on a selection of allotments supplemented, rather than contradicted, the policy of absorbing the Indian territory into Oklahoma and merely reflected Congress's concern for the supposedly most unsophisticated Indians. *See Heckman v. United States*, 224 U.S. 413, 446–47 (1912) ("The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment" in order to protect certain Indians from "incompetence and thriftlessness.").

What limited allotment restrictions persisted were not of independent jurisdictional significance—they did not run with the land and, by their own terms, would "be terminated by the lapse of varying periods of time." *Bartlett*, 235 U.S. at 79 (holding restriction on Creek allotment expired and was not resurrected). As the Court observed in a case

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[13] Other federal courts treated Judge Pollock's *Bell* opinion as the definitive word on Congressional intent. *E.g.*, *Cully v. Mitchell*, 37 F.2d 493, 498 (10th Cir. 1930) ("We are of the opinion that Judge Pollock, who has had wide experience in Indian litigation, correctly stated the real intent of Congress, and of the general understanding of that intent[.]"); *see also United States v. Ferguson*, 247 U.S. 175, 179 (1918) (approvingly citing *Bell*).

involving an Oklahoma Indian with a restricted "homestead" allotment, "[i]t is evident that, as respects his property other than his homestead, his status is not different from that of any citizen of the United States." *Choteau v. Burnet*, 283 U.S. 691, 695 (1931). Congress's time-limited restrictions on certain allotments merely represented its efforts to regulate the affairs of individual Indians—the restrictions were *not* "an incident attached to the land itself." *Williams v. Johnson*, 239 U.S. 414, 419 (1915) (quotations omitted) (rejecting argument that personal alienation restrictions ran with the land); *see also Venetie*, 522 U.S. at 531 n.5 ("it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government" for land to constitute Indian country).[14]

Thus, in *Oklahoma Tax Commission*, this Court held that Congress intended for Oklahoma to exercise its jurisdiction over the Indian Territory despite any lingering alienation restraints. Concluding that Oklahoma had full authority to impose an estate tax on land transfers of members of the Five Tribes, the Court explained that although states may not be able to "regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status," this is "a condition *which has not existed for*

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[14] *See also United States v. Dowden*, 194 F. 475, 482 (C.C.E.D. Okla. 1911) (rejecting argument that allotments were tribal land subject to permanent restrictions, because any "restrictions upon the alienation which attached to the tribal title must be held to have ceased with the extinguishment of that title"); *Goat*, 224 U.S. at 470 ("The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed").

many years in the State of Oklahoma." *Oklahoma Tax Comm'n*, 319 U.S. at 602 (emphasis added).

Moreover, the remaining alienation restrictions on *some* allotments did not oust Oklahoma of authority over the *entire* former Indian territory. Although other cases had recognized such a purpose when the relevant land was, in fact, communal Indian country, "[t]he underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians." *Oklahoma Tax Comm'n*, 319 U.S. at 603; *see also id.* at 601–03. The members of the Five Tribes were unlike Indians on separate reservations outside of the control of state government. Rather, after statehood they were "actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; *see also id.* at 608–09 ("Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society.").[15]

In short, when Congress abrogated the United States's treaties with the Five Civilized Tribes it ensured that the Tribes' members became "full fledged citizens of the State of Oklahoma." *Id.* at 609. Like other state citizens, members of the Five Tribes are thus subject to the state's "police protection" and criminal jurisdiction. *Id.* at 608–09. The Court should

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[15] The "tax exemptions" referred to were not general immunities from taxation, but specific exemptions which, like the alienation restrictions, were personal to particular allottees and merely temporary. *See Choate*, 224 U.S. at 679 n.†; *Fink v. Bd. of Comm'rs of Muskogee Cnty.*, 248 U.S. 399, 403–04 (1919).

reverse the Tenth Circuit's decision holding that Respondent could not be prosecuted by the state.

II. Under the Court's "Disestablishment" Jurisprudence, the Former Creek Territory Is Not Indian Country

Given that the Creek Territory was never a "reservation," this Court's disestablishment cases do not apply here. But even if they did, their proper application demonstrates that Congress abolished any "Indian country" that existed prior to statehood and granted Oklahoma jurisdiction over the former Indian territory.

A. There Is No "Hierarchical" Test for Determining Congressional Intent to Vest the State with Jurisdiction over Former "Indian Country"

The Tenth Circuit labored under the misimpression that disestablishment requires a particular statutory talismanic incantation: "whether it's 'public domain' or whether it's the word 'cede' or whether it's a lump-sum payment." Pet. App. 76a; *id.* ("We're looking for specific language."). It also believed its analysis was dictated by a strict "hierarchical, three-step framework," and that the absence of the purported magic words essentially decided the case. *Id.* at 61a.

But the Tenth Circuit's demand for "particular statutory language," as well as its "*hierarchical*, three-step framework" are directly contrary to this Court's precedent. As the Court has repeatedly explained, there is only one question to answer: did Congress intend to invest the state with jurisdiction? *See Rosebud Sioux*, 430 U.S. at 586 ("congressional

intent will control"); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose."). And the answer to that question requires considering a variety of sources: "In all case[s], 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." *Rosebud Sioux*, 430 U.S. at 587.

Accordingly, no single factor outweighs all others, and there is no need to invoke "particular statutory language." In a passage that applies with equal force here, the *Rosebud Sioux* Court rejected "the notion that such express language in an Act is the only method by which congressional action may result in disestablishment." 430 U.S. at 588 n.4 ("The dissent erroneously seizes upon several factors and presents them as apparent absolutes. This, however, misapprehends the nature of our inquiry . . . ."). There is no "'clear-statement rule'" for disestablishment, and the Court has "never required any particular form of words before finding diminishment." *Hagen*, 510 U.S. at 411–12.

B. The History of Oklahoma Regulation Confirms That Congress Gave Oklahoma Authority over the Five Tribes' Former Territory

By its allotment and extinguishment of the tribal fee, imposition of Oklahoma law, and extension of Oklahoma's jurisdiction, Congress effectuated its express goal: "the extinguishment of the national or tribal title to any lands within that Territory . . . so far as may be necessary, be requisite and suitable to

enable the ultimate creation of a State . . . which shall embrace the lands within said Indian Territory." Act of March 3, 1893, ch. 209, 27 Stat. 612, 645; *see* pp. 13–14, *supra*.

If there were any ambiguity in the congressional record, the history of regulation—including oil and gas regulation—over the past 100 years confirms that Congress gave Oklahoma jurisdiction over the former territory of the Five Tribes. *Rosebud Sioux*, 430 U.S. at 604 (the "State's [long-accepted] exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'").

1. Oklahoma has been a leading producer of oil and gas for over a century, and is currently the 5th highest crude oil producing state in the country, and the 3rd highest natural gas producer. *Oklahoma, U.S. Rankings*, U.S. Energy Info. Admin., *available at* https://tinyurl.com/yc7a5vly. Production occurs across the state, with active oil and gas wells in 71 of Oklahoma's 77 counties—including counties in each of the Five Tribe's historical territory. Indep. Petroleum Ass'n of Am., *The Oil & Gas Producing Industry in Your State*, 92 (November 2016), *available at* https://tinyurl.com/y7z24yrs.

Oklahoma's oil and gas industry has prospered under a stable, well-developed, and state-wide regulatory regime overseen by the Oklahoma Corporation Commission ("OCC"), which, for over a century, has wielded "exclusive jurisdiction, power and authority" over oil and gas development in the state. Okla. Stat. tit. 52, § 139(B)(1); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017); *see also Republic Nat'l Gas Co. v. Oklahoma*, 334 U.S. 62, 63 (1948) ("[s]ince 1913," the OCC "has regulated the extraction of

natural gas" in Oklahoma). "The OCC exercises its exclusive jurisdiction over [oil and gas] wells through a comprehensive system of permit adjudication." *Sierra Club*, 248 F. Supp. 3d at 1200. The OCC also regulates energy development pollution, and has sole jurisdiction to resolve complaints alleging that an oil or gas project violates environmental law. *See id.* at 1208–09.

This regulatory regime was put in place based on the universal understanding that the historical territories of the Five Tribes are governed by Oklahoma, not tribal, law. Although the narrow alienation restrictions on certain allotments temporarily affected some oil and gas leases, they expired on their terms. *Pluto Oil & Gas Co. v. Miller*, 219 P. 303, 305 (Okla. 1923); *United States v. Gypsy Oil Co.*, 10 F.2d 487, 491 (8th Cir. 1925).[16] Similarly, lands throughout the Indian territory were subject to Oklahoma's tax on "the production of oil and gas," absent specific tax exemptions. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 577 (1928) ("full blood Creek Indian" subject to Oklahoma production tax); *id.* at 582 (Congress intended "that Indian

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[16] The primary exception to Oklahoma's state-wide regulation of mineral rights relates to the land underlying the former reservation of the Osage Nation. *See, e.g., Phillips Petroleum Co. v. U.S. E.P.A.*, 803 F.2d 545, 549 (10th Cir. 1986). At statehood, Congress "severed the mineral estate from the surface estate of the [Osage] reservation and placed it in trust for the tribe," thus allowing for Osage regulation of mineral and underground rights. *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010); *Phillips Petroleum*, 803 F.2d at 556 n.15. The OCC also lacks regulatory jurisdiction over various individual allotments under Section 1151(c). *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992).

citizens might assume the just burdens of state taxation").[17]

Oklahoma's exercise of taxation and regulation has long been based on the assumption that no reservation exists. For example, Oklahoma's nondiscriminatory gas taxes would not be permitted in Indian country, as states generally do *not* have authority to "tax[] Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Moreover, although the federal government has "primary jurisdiction" over environmental regulation in "Indian country," environmental programs critical to the oil and gas industry have historically been overseen by Oklahoma state regulators. *Cf. Yankton Sioux*, 522 U.S. at 333. For example, the Safe Drinking and Water Act ("SDWA") allows states to assume primary responsibility for regulating the injection of effluents into the ground—a process used to improve oil and gas production. *See Phillips Petroleum*, 803 F.2d at 549. Although the EPA may grant a tribe "primary enforcement responsibility" over the water in its tribal territory, Oklahoma—not the Five Tribes—has implemented a state-wide

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[17] Lingering tax exemptions on individual allotments (*see* n. 15, *supra*) were ended by Congress in 1928. *See United States v. Hester*, 137 F.2d 145, 146–47 (10th Cir. 1943) (explaining effect of Act of May 10, 1928); *see also id.* at 147 ("Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws.").

regulatory regime under the SDWA for underground injection. *See id.*[18]

The history of mineral leasing also demonstrates the plenary nature of Oklahoma's jurisdiction over the former territories of the Five Tribes. The Indian Mineral Leasing Act and Indian Mineral Development Act give the Secretary of the Interior ultimate authority to approve and disapprove mineral mining leases or energy development contracts involving certain Indian lands. *See* Indian Mineral Leasing Act of 1938 ("IMLA"), ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g); Indian Mineral Development Act of 1982 ("IMDA"), Pub. L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–08). But the Secretary does not exercise such authority in eastern Oklahoma—the state does. *See Sperry Oil & Gas Co. v. Chisholm*, 264 U.S. 488, 497–98 (1924) (still-effective allotment restrictions required Secretarial lease approval, but when restrictions expired, leasing of Indian-held land was "under the laws of the State, just as the property of other citizens").

The long history of state regulation over Oklahoma's iconic oil & gas industry is powerful evidence that Congress terminated whatever "Indian

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[18] The sole exception is the Osage mineral trust. *See* n. 16, *supra*. Although the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005, Pub. L. No. 109–59, 119 Stat. 1144, section 10211(a), provides that Oklahoma may exercise environmental authority in Indian country, it is unclear if Oklahoma could use this provision to displace Tribal Implementation Plans that the Five Tribes would presumably enact in their new "reservations," and use of the SAFETEA provision requires separate EPA approval. *See Oklahoma Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 190 (D.C. Cir. 2014).

country" designation the Five Tribes' territory may have had before statehood. Thus, even if this Court's disestablishment cases were on point (which they are not), the Tenth Circuit plainly erred in concluding that a Creek reservation exists today.

III. The Tenth Circuit's Decision, if Allowed to Stand, Would Throw Oklahoma's Regulatory Regime into Chaos

The Tenth Circuit's designation of half of Oklahoma as "Indian Country" would result in a fundamental shift in regulatory authority from the state of Oklahoma to the tribes and the federal government. This Court resists novel judicial recognition of "Indian country" when such a "conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 605 ("justifiable expectations [] should not be upset" by unjustified imposition of federal authority). Yet the Tenth Circuit's decision, if upheld, would "seriously disrupt" the expectations of millions of Oklahomans.

In the oil and gas field alone, the reservation would disrupt Oklahoma's taxation regime and create new Indian tax shelters. For example, a non-Indian operating an oil well in the new "Indian country" would likely owe taxes to Oklahoma while a tribal member would not. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). The Tribes could also impose their own taxes and regulations on non-Indian oil and gas lessees. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982) (upholding the authority of the Jicarilla Apache Tribe to "impos[e] a severance tax on 'any oil and natural gas severed, saved and removed from Tribal lands'");

Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985) (upholding tribal tax on business activity within reservation, including mineral production); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). The Tribes may also attempt to enact zoning ordinances that would impact energy production. *See, e.g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). This additional tax and regulatory burden could bankrupt producers already operating on thin margins.[19]

The Tenth Circuit's decision could also expose oil producers operating in what was open land to claims that their wells lie in tribal lands—and that their rights to the land are invalid because they were never approved under the IMLA or IMDA. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 n.3 (1985) (Secretary of the Interior's approval authority could include practically all reservation territory); *Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) ("language requiring governmental approval of Indian agreements . . . has been interpreted to mean that the agreements simply are invalid absent the requisite approval"). The Five Tribes could also promulgate any number of regulations under the SDWA and Clean Air Act

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[19] Approximately 10% of the oil produced in Oklahoma comes from wells that produce no more than ten barrels of oil per day during a twelve-month period. *Marginal Wells: Fuel for Economic Growth*, Interstate Oil and Gas Compact Commission, 2016, 9, *available at* https://tinyurl.com/y94c7xvk; *see also* Nicole Friedman, *'Strippers' Pose Dilemma for Oil Industry*, Wall Street Journal (September 7, 2015), *available at* https://tinyurl.com/ y7mynqau.

("CAA"), leaving producers with wells scattered across the state subject to six separate regulatory regimes—those of the Five Tribes and Oklahoma's.[20] The cost of compliance with these overlapping, duplicative, and possibly conflicting regulations could force smaller operators out of business.

Moreover, because "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members," the Tenth Circuit has created a recipe for near endless litigation. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Case-by-case analysis will be required to determine whether Oklahoma may "assert[] authority over the conduct of non-Indians engaging in activity" on these newly discovered reservations. *Id.* at 144. This is because the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. As a result, the question of what conduct Oklahoma will be allowed to regulate (and how) in the eastern half of the state will be litigated for decades to come.

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[20] Similar to the SDWA, the CAA allows the EPA to "delegate[] to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation." *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (citing Tribal Authority Rule, 59 Fed. Reg. 43,956 (1994)). Under the SDWA and CAA, all "areas within the exterior boundaries of a tribe's reservation [are] per se within the tribe's jurisdiction" for environmental regulation. *Arizona Pub. Serv.*, 211 F.3d at 1288.

Tribal authority to tax and regulate non-Indians is similarly indeterminate. In order to tax the millions of non-Indians who own land within the boundaries of these newly constituted reservations, the Five Tribes will have to show that the non-Indians either (1) "enter[ed] consensual relationships with the tribe or its members," or (2) engaged in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565–66. Satisfying these requirements—and determining whether any particular tax levied by a tribe is "fairly related to the services provided"—will require fact-dependent and case-specific inquiry. *Merrion*, 455 U.S. at 157.

* * *

The Tenth Circuit's decision cannot be reconciled with the historical record, contemporary practice, or this Court's precedent. To prevent Oklahoma's legal regime from being thrown into chaos, the Court should reverse the Tenth Circuit's decision and hold that the Five Tribes' lands are not "Indian country" under 18 U.S.C. § 1151.

CONCLUSION

The decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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July 30, 2018

No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE OKLAHOMA SHERIFFS' ASSOCIATION, OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION, AND TEN OKLAHOMA DISTRICT ATTORNEYS IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The Oklahoma Sheriffs' Association, the Oklahoma District Attorneys Association, District Attorney O.R. Barris III, District Attorney Paul B. Smith, District Attorney Max Cook, District Attorney Orvil Loge, District Attorney Jack Thorpe, District Attorney Steve Kunzweiler, District Attorney Jeff Smith, District Attorney Chuck Sullivan, District Attorney Matt Ballard, and District Attorney Mike Fields respectfully submit this *amici curiae* brief in support of petitioner.*

The Oklahoma Sheriffs' Association is a non-profit that represents elected Sheriffs in all 77 counties of Oklahoma. The association has 4,000 active members and is one of the State's largest law enforcement associations. The association and its predecessors have represented Sheriffs in Oklahoma since statehood. The association's mission is to support the Sheriffs in providing effective and quality law enforcement services to the people they protect and serve.

The Oklahoma District Attorneys Association is a non-profit that represents local elected prosecutors in Oklahoma. The association serves as the voice of the State's prosecutors and supports their efforts to protect the people they serve.

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation and submission of this brief. The parties consented to the filing of this brief.

District Attorney O.R. "Rob" Barris III is the elected prosecutor for Okmulgee County and McIntosh County. Mr. Barris has worked for more than three decades to make the communities he serves safer and better places to live. He has twice been named Outstanding Prosecutor in the State and he has tried over 200 cases before juries.

District Attorney Paul B. Smith is the elected prosecutor for Seminole County, Hughes County, and Pontotoc County. Mr. Smith has over three decades of prosecution experience and has first chaired more than 100 trials.

District Attorney Max Cook is the elected prosecutor for Creek County and Okfuskee County.

District Attorney Orvil Loge is the elected prosecutor for Muscogee County.

District Attorney Jack Thorpe is the elected prosecutor for Wagoner County, Cherokee County, and Adair County.

District Attorney Steve Kunzweiler is the elected prosecutor for Tulsa County. Mr. Kunzweiler directs a large team of roughly 50 attorneys and 70 support staff. He has overseen the prosecution of hundreds of violent offenders.

District Attorney Jeff Smith is the elected prosecutor for Latimer County and LeFlore County.

District Attorney Chuck Sullivan is the elected prosecutor for Haskell County and Pittsburg County.

District Attorney Matt Ballard is the elected prosecutor for Craig County, Mayes County, and Rogers County.

District Attorney Mike Fields is the elected prosecutor for Blaine County, Canadian County, Garfield County, Grant County, and Kingfisher County. Mr. Fields is a career prosecutor with over two decades of experience. He recently served as the President of the Oklahoma District Attorneys Association.

These associations and local elected prosecutors are deeply concerned about the ramifications of the Tenth Circuit's decision below for law enforcement in the State of Oklahoma. While this case has undeniable implications for the Nation and the State of Oklahoma broadly, *amici* have more immediate concerns—they are tasked with serving Oklahoma communities in the uniquely local responsibility of law enforcement. The prosecutors and sheriffs are directly elected by the communities they serve and are held accountable to ensure crimes occurring within their jurisdictions are thoroughly investigated and prosecuted in accordance with Oklahoma law. The associations, for their part, represent those that carry out the responsibilities of law enforcement for their local communities.

Affirming the Tenth Circuit's decision below would effectively turn law enforcement in many parts of Oklahoma on its head. For over one hundred years the people of Oklahoma have placed their trust in locally elected sheriffs and prosecutors to investigate and prosecute crimes occurring in vast regions of the State of Oklahoma that were once held by the Five Tribes

regardless of the identify of victims and perpetrators. The Tenth Circuit's decision below threatens not only to substantially divest local elected officials of this authority going forward in a wide array of matters, it also threatens to undo decades of existing convictions that their efforts have obtained.

The Tenth Circuit's sweeping ruling would likely usurp the role of local law enforcement in all crimes that in any way involve any members of Indian tribes. Federal agents and United States attorneys are not an acceptable substitute for law enforcement carried out and funded at the State level. Congress and the President will not be able to appropriately fund and oversee the enforcement of law in a vast territory with a population of over 1.8 million people that is more than 1,000 miles away from Washington, D.C.

Affirming the Tenth Circuit's decision below will also inflict an enormous undue burden on local sheriffs and prosecutors even in cases that do not actually involve members of Indian tribes. Every potential defendant or convicted individual can raise as a defense their own potential membership in a tribe and also raise the potential membership of any victim of a crime as well. Assessing such claims of Indian involvement in crimes that do not even occur on land owned or held by Indians or tribal governments will divert significant time and energy away from vital law enforcement responsibilities.

The *amici* accordingly submit this brief to assist the Court in consideration of the merits of this case and respectfully urge the Court to reverse.

SUMMARY OF THE ARGUMENT

The history of the treatment of the men and women of Indian descent and their tribal governments is replete with shameful episode after shameful episode. Yet Congress took the final step toward achievement of its objectives concerning the land of the Five Tribes in a manner that for once showed a measure of respect and fidelity to the core principles of the Declaration of Independence. Specifically, for the first and only time in American history Congress provided for members of Indian tribes to be full and equal participants in the creation and admission of a new State.

This unique role of the people of the Five Tribes in the birth of the State of Oklahoma is a distinctive aspect of their heritage that deserves to be honored and celebrated. And the Court should also carefully consider the legal significance of the participation of the people of the Five Tribes in the election of delegates to the constitutional convention, the service of numerous of their own people as delegates at the constitutional convention, and the affirmative ratification votes by majorities in each and every discrete political community in the area that formerly comprised the land of the Five Tribes. If Congress intended the incorporation of the people of the Five Tribes into the body politic that created the new State to dissolve obligations owed to the former sovereign tribal governments, the Court must conclude those treaty obligations did not survive the step Congress took intending to abrogate them. The Court should also assess whether the transfer of sovereignty by the people of the Five Tribes to the new State dissolved obligations owed to tribal governments.

Any lingering doubt over the matter is resolved by the State of Oklahoma's immediate and unchallenged assumption of jurisdiction and plenary exercise of full dominion and sovereignty throughout the succeeding century over lands that formerly had been reserved to the Five Tribes. As the Court long ago, this particular kind of subsequent history is unusually indicative of what Congress intended and what Congress did. For it beggars belief to presume that no one challenged the authority of the new State in capital cases that involved Indians or in the payment of untold sums of taxes levied each and every year for over a century. The subsequent history at issue in this case was not the mere salutary neglect or subtle encroachment that the Court has found is not considerable evidence of what Congress intended in prior cases. Rather, this is the first time the Court has ever been presented with this particular kind of subsequent history evidence. In light of the distinctive and probative value it offers, in this case the Court should give the longstanding exercise of plenary dominion and sovereignty by the State of Oklahoma ample weight in assessing what Congress intended and did.

Accordingly, *amici* urge the Court to reverse the decision of the court below.

ARGUMENT

I. Congress and the people of the Five Tribes together abrogated prior treaties reserving land to tribal governments through the unique process that formed the new State.

The Tenth Circuit searched for express "termination language" in Acts or treaties by which Congress unilaterally stated that an Indian reservation was "discontinued," "vacated," or "abolished," or by which one of the governments of the Five Tribes agreed to "cede," "relinquish," or "surrender" a reservation. Pet. App. 97a–98a. In other words, the Tenth Circuit expected at the end of this long saga that Congress would announce or exact some final disgrace, by either expressly renouncing promises of the United States, unilaterally dissolving reservations by legislative fiat, or forcing the governments of the Five Tribes to make some solemn and formal statement of capitulation. While Congress certainly earned such low expectations from its actions over decades and decades, the final Act Congress passed in its dealings with the people of the Five Tribes took a starkly different approach that reflected and respected the fundamental equality, the civil abilities, and the political dignity of the people of those tribes.

Specifically, Congress directly made the members of the Five Tribes part of "the people" who convened, formed a constitution for a new State, and ratified that constitution of the new State. Congress provided in the Oklahoma Enabling Act that the "members of any Indian nation or tribe . . . are hereby authorized to vote

for and choose delegates to form a constitutional convention for [the] proposed State" and that "all persons qualified to vote for . . . delegates shall be eligible to serve as delegates." Oklahoma Enabling Act, 34 Stat. 267, 268. Congress further thereby included the members of the Five Tribes among "the people of [the] proposed State" to whom the constitution was "submit[ed] . . . for its ratification or rejection at an election" in which they had a right to vote "for or against the proposed constitution, and for or against any provisions separately submitted." 34 Stat. 267, 271.

The members of the Five Tribes accordingly participated in the election of delegates to the constitutional convention on November 6, 1906. Their participation in these elections secured for them significant and powerful representation at the constitutional convention. Ten Indian members of the Five Tribes were elected, including several who served in prominent positions as chairmen of key committees:

- Henry L. Cloud was a Cherokee Indian elected as a delegate from the twenty-third district. Blue Clark, *Delegates to the Constitutional Convention*, 48 CHRONS. OKLA. 400, 407 (1970) ("*Delegates*"); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA 13–14 (1907) ("PROCEEDINGS"). Mr. Cloud served on the Memorial to Congress Committee, the Deficiency Appropriation Committee, the Suffrage Committee, the Enrolling and Engrossing Committee, the Primary Elections Committee, the State and School Lands Committee, the Revision, Compilation, Style

and Arrangement Committee, and the Coal, Oil and Gas Committee. *Id.* 29, 47–48, 52–53, 65, 126. Mr. Cloud presented three petitions to the convention relating to religious liberty, agriculture and education, and liquor traffic. *Id.* 73, 121, 143, 155.

- Oliver P. Brewer was a Cherokee Indian elected as a delegate from the seventy-seventh district. *Delegates* at 407; PROCEEDINGS 13. The convention selected Mr. Brewer to be the Chairman of the Education Committee. Mr. Brewer also served on the Suffrage Committee, the Public Institutions and State Buildings Committee, the Enrolling and Engrossing Committee, and the State Militia Committee. *Id.* 47–48, 52. He successful introduced a petition at the convention for the convention to request that Congress eliminate the restraints on alienation of allotted lands, and he introduced petitions on other matters as well. PROCEEDINGS 143, 162.

- Albert S. Wyly was a Cherokee Indian elected as a delegate from the seventy-second district. *Id.* 13–14. The convention selected Mr. Wyly to be Chairman of the Public Institutions and State Buildings Committee. *Id.* 47. He also served on the Memorial to Congress Committee, the Legislative Department Committee, the Education Committee, and the Municipal Corporations Committee. *Id.* 46–47, 126. Mr. Wyly submitted a petition on liquor traffic to the convention. *Id.* 150.

- Clement V. Rogers was a Cherokee Indian elected as a delegate from the sixty-fourth district. *Delegates* at 407; PROCEEDINGS 13–14. The convention

selected Mr. Rogers to be Chairman of the Salaries and Compensation of Public Officers Committee. *Id.* 48. He also served on the Legislative Department Committee, the Homesteads and Exemptions Committee, the Liquor Traffic Committee, the Counties and County Boundaries Committee, and the Impeachment and Removal from Office Committee. *Id.* 46, 52, 72.

- Gabriel E. Parker was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. The convention selected Mr. Parker to be Chairman of the Seal of State Committee, Vice Member of the Liquor Traffic Committee, and Chairman Pro Tem of the Executive Department Committee. *Id.* 183, 187, 246. He also served on the Memorial to Congress Committee, the Education Committee, the Revenue and Taxation Committee, the Mines and Mining, Oil and Gas Committee, the State and School Lands Committee, the County and Township Organization Committee. *Id.* 126, 47, 52–53.

- James Riley Copeland was a Cherokee Indian elected as a delegate from the sixty-second district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Immigration Committee, the Public Roads and Highways Committee, the Impeachment and Removal from Office Committee, the Convention Accounts and Expenses Committee, the Public Debt and Public Works Committee, and the Coal, Oil and Gas Committee. *Id.* 47, 52–53, 65. Mr. Copeland submitted petitions to convention relating to marriage and suffrage for woman. *Id.* 145, 181.

- Charles O. Frye was a Cherokee Indian elected as a delegate from the eighty-fourth district. *Delegates* at 407; PROCEEDINGS 14. Mr. Frye was nominated by Mr. Cloud for vice president of the convention. PROCEEDINGS 26. He served on the Deficiency Appropriation Committee, the Federal Relations Committee, the Private Corporations Committee, the Convention Accounts and Expenses Committee, the Public Printing Committee. *Id.* 29, 46, 50, 53, 65. Mr. Frye submitted petitions to the convention relating to county boundaries, uniform taxation, and platted towns. *Id.* 120, 125, 145.

- Benjamin F. Harrison was a Choctaw Indian elected as a delegate from the eighty-eighth district. *Delegates* at 407; PROCEEDINGS 14. He served on the Preamble and Bill of Rights Committee, the Executive Department Committee, the Railroads and Public Service Corporations Committee, the State and School Lands Committee, the Public Debt and Public Works Committee, and the Address to the Public Committee. *Id.* 46–47, 52–53. Mr. Frye submitted a petition relating to religious liberty to the convention. *Id.* 73.

- James Turner Edmondson was a Cherokee Indian elected as a delegate from the sixty-sixth district. *Delegates* at 407; PROCEEDINGS 13–14. He served on the Agriculture Committee, the Executive Department Committee, the Public Roads and Highways Committee, and the Homesteads and Exemptions Committee. *Id.* 46–47, 52.

- Preeman J. McClure was a Choctaw Indian elected as a delegate from the one hundred and eleventh district. *Delegates* at 407; PROCEEDINGS 14. Mr. McClure served on the Agriculture Committee and the Homesteads and Exemptions Committee. *Id.* 47, 52.

In addition, the people of the Oklahoma Territory and the Indian Territory elected five members of the Five Tribes by intermarriage as delegates to the convention: William H. Murray (Chickasaw), James S. Latimer (Choctaw), Christopher C. Mathis (Choctaw), William N. Littlejohn (Cherokee), and Milas Lasater (Chickasaw). *See* PROCEEDINGS 13–14. The election of so many members of the Five Tribes led to the selection of a member of the Chickasaw Nation by intermarriage, William H. Murray, as the president of the constitutional convention. William H. Murray, *The Constitutional Convention*, 9 CHRONS. OKLA 126, 133 (1931).

The members of the Five Tribes who served as delegates were founding fathers of the State of Oklahoma. On the last day when the work of drafting the State's constitution was completed on July 16, 1907, the convention began with an invocation by one of their own, Mr. Cloud. PROCEEDINGS 375. Then all twelve of the members of the Five Tribes who were present that day voted in favor of the final adoption of the constitution by the convention and submission to the people and each of them "affixed their signatures" to the parchment. *Id.* 375, 382–84.

The people of the proposed State of Oklahoma voted on September 17, 1907, to ratify the constitution.

2 OKLAHOMA RED BOOK 292–93 (1912). As "qualified voters for the . . . proposed State" members of the Five Tribes participated in this election. PROCEEDINGS 460. The result of the election were majority votes in favor of ratification in each and every county in the proposed new State, including in areas that had elected Indian delegates to the convention. 2 OKLAHOMA RED BOOK 292–93 (1912). Examining county-by-county results in detail shows there was no strong push for rejection of the Constitution by the members of the Five Tribes. For example, at the time in Adair County there were 818 Indians of voting age but only 385 votes in total were cast to reject the constitution. *See* POPULATION OF OKLAHOMA AND INDIAN TERRITORY 34–35 (1907) ("POPULATION"); 2 OKLAHOMA RED BOOK 292 (1912). Similarly, in Delaware County there were 593 Indians of voting age but only 361 votes were cast to reject the constitution. *See* POPULATION 34–35; 2 OKLAHOMA RED BOOK 292 (1912).

And so President Roosevelt issued the proclamation of statehood on November 16, 1907. As a result, a new State of Oklahoma comprised of "all of that part of the area of the United States" formerly "constituting the Territory of Oklahoma and the Indian Territory" was admitted to the Union "on an equal footing with the original States." 34 Stat. 267, 271.

Thus, the State of Oklahoma was created by a process that Congress ensured included the people of the Five Tribes as full and equal members of the political community. This was not a choice that was foreordained by the Constitution according to the Court's then-governing interpretation of the Fourteenth

and Fifteenth Amendments which permitted denying Indians voting rights. *See Elk v. Wilkins*, 112 U.S. 94 (1884). With that precedent still in force, Congress deliberately enacted the provisions of the Oklahoma Enabling Act that afforded key civil rights to all of the Indians inhabiting the proposed new State.

The Court has never had occasion to consider the effect of Congress's deliberate incorporation of the members of Indian tribes into the body politic as part of the creation of a State because the Oklahoma Enabling Act is the only enabling act Congress passed that enfranchised members of Indian tribes so that they could participate in the statehood process.[1]

The role of the people of the Five Tribes in creating the State of Oklahoma implicates whether the four provisions of treaties at issue in this case survived the statehood process in two ways.

First, the people of the Five Tribes directly participated in a constitutional convention and ratification of a constitution. By this exercise of their political sovereignty they endowed their new State government

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1. *See* Ohio Enabling Act, 2 Stat. 173; Louisiana Enabling Act, 2 Stat. 641; Indiana Enabling Act, 3 Stat. 289; Mississippi Enabling Act, 3 Stat. 348; Illinois Enabling Act, 3 Stat. 428; Alabama Enabling Act, 3 Stat. 489; Missouri Enabling Act, 3 Stat. 545; Wisconsin Enabling Act, 9 Stat. 56; Minnesota Enabling Act, 11 Stat. 166; Nevada Enabling Act, 13 Stat. 30; Nebraska Enabling Act, 13 Stat. 47; Colorado Enabling Act, 18 Stat. 474; North Dakota, South Dakota, Montana, and Washington Enabling Act, 25 Stat. 676; Utah Enabling Act, 28 Stat. 107; New Mexico and Arizona Enabling Act, 36 Stat. 557.

with the sovereign powers that formerly belonged to various tribal governments. As a result, the people of the Five Tribes abrogated prior treaties made by those tribal governments on their behalf except to the extent they relate to individual "person or property" so as to have been expressly preserved by Congress in the Oklahoma Enabling Act. 34 Stat. 267.

Second, the intent of Congress with regard to the effect of the incorporation of the people of the Five Tribes by itself is sufficient to abrogate prior treaty provisions concerning lands that had been conveyed to the Five Tribes. If Congress intended for the role of the people of the Five Tribes in the statehood process to terminate these provisions of prior treaties, the Act of Congress employing such means has legal force to achieve those ends.

Whether the legal effect of the role of the people of the Five Tribes is considered directly or through the lens of the intent of Congress, the analysis must begin with the same foundational thesis: "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "it is the Right of the People to alter or to abolish" existing government "and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Indeed, the Constitution of the State of Oklahoma itself declares "[a]ll political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote the general welfare; and

they have the right to alter or reform the same whenever the public good may require it: Provided, Such change be not repugnant to the constitution of the United States." OKLA. CONST. art. II, § 1. The retention of the power by the people to reform or replace their government is a "fundamental principle of republican government." THE FEDERALIST NO. 78 (Alexander Hamilton). Exercising this power requires "some solemn and authoritative act" by a "majority of the people." *Id.*; THE FEDERALIST NO. 39 (James Madison). The traditional method employed for this purpose since the founding era is a constitutional convention drafting and submitting a constitution to the people for ratification.

Accordingly, when the people assemble their chosen representatives at a special convention to form a new government, the people unleash "the fountain of all political power," *Benner v. Porter*, 50 U.S. 235, 242 (1850), capable of dissolving all prior legal bonds and obligations and adjusting, casting aside, or preserving existing governments "at their own pleasure," *Luther v. Borden*, 48 U.S. 1, 47 (1849), so long as any new constitution is ratified by the "majority of the people" who would subject to its authority. THE FEDERALIST NO. 39 (James Madison).

There are some limits to the power of conventions. The scope of a convention's authority is inherently defined by the constituency of "the people" who are represented at it and in the ratification process. *See* THE FEDERALIST NO. 39 (James Madison) (observing ratification of the United States constitution "must result from the *unanimous* assent of the several States

that are parties to it" as reflected in the votes at each State's individual ratifying convention); *Minor v. Happersett*, 88 U.S. 162, 167 (1875) ("Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people . . . ."). Accordingly, the Court has found it legally significant to identify "whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress." *Boyd v. Nebraska*, 143 U.S. 135, 170 (1891); *see also United States v. Allen*, 171 F. 907, 920–21 (E.D. Okla. 1909) ("[The Enabling Act's] terms clearly make [the Indian members of the Five Tribes] electors and give them the right to participate in the formation of the state Constitution and state government . . . . [T]herefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges, and immunities of citizenship."). The Court has also explicitly recognized the authority of Congress to define the composition of who is and who is not represented in the formation of new States. *Boyd v. Nebraska*, 143 U.S. 135, 175 (1891) ("Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community.").

In creating the new State of Oklahoma, Congress required that "members of any Indian nation or tribe" inhabiting the proposed new State had to be "allowed to participate in the direction of the affairs of the state and in the formation of the government" and the "framing of its Constitution, the fundamental laws of the state." *Wah-tsa-e-o-she v. Webster*, 172 P. 78, 79 (Okla. 1918). The Supreme Court of Oklahoma held

soon thereafter that it was therefore "the purpose and intent of Congress and of the people of the proposed state in the erection of the state and in creating its government that [the] Indians should become citizens thereof" who therefore must "make their conduct conformable to the laws of the state, except where especially exempted therefrom." *Id.*

Withdrawing sovereignty from the Five Tribes, granting sovereignty to a new State over areas previously set aside for the Five Tribes, and subjecting members of the Five Tribes to the laws of that new State squarely contravened core provisions of treaties between the United States and the governments of the Five Tribes. But Congress did not proceed on its own authority alone. Congress called for a convention which represented the people of the Five Tribes that thereby had full political and legal authority to take this step despite various provisions of prior treaties made on their behalf by the tribal governments.

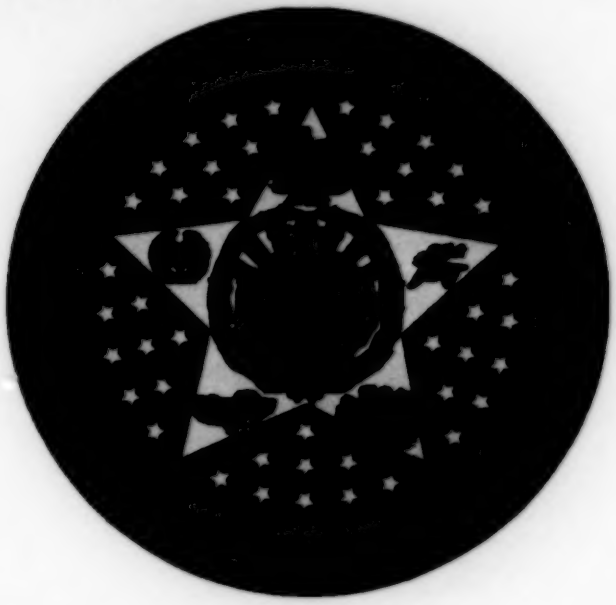
Critically, the Five Tribes themselves demonstrated to Congress the political and legal legitimacy of using a constitutional convention to unite the areas occupied by the members of the Five Tribes and consolidate all of the inhabitants thereof into one people subject to the authority of a new State. In 1905, leaders of the Five Tribes called for a constitutional convention for all of the area then known as the Indian Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299 (1950). The delegates elected to

this convention crafted a constitution which was then ratified by an overwhelming majority of the inhabitants of the area and submitted to Congress in a petition seeking admission of a new State of Sequoyah. 1 OKLAHOMA RED BOOK 623–74 (1912) (Constitution of the State of Sequoyah); *Proposed State of Sequoyah*, S. DOC. NO. 59-143 (1906). The Sequoyah Constitution declared "[a]ll political power is vested in and derived from the people; is founded upon their will, and is instituted for the good of the whole," and affirmed that "[t]he people of this State have the interest and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness; provided, such change be not in conflict with the Constitution of the United States." 1 OKLAHOMA RED BOOK 623 (1912). Thus, the leaders of the Five Tribes blazed a path that Congress promptly followed.

Moreover, before the Sequoyah Convention leaders of the Five Tribes convened at the Turner Hotel in the summer of 1905 and agreed in writing that if their efforts to obtain a separate state for the Five Tribes failed in Congress they would support and not oppose the formation of a single state comprised of the lands they occupied and the land of the neighboring Oklahoma Territory. *See Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187, 198 (1936); Amos Maxwell, *The Sequoyah Convention*, 28 CHRONS. OKLA. 161, 182 (1950); Amos Maxwell, *The Sequoyah Convention (Part II)*, 28 CHRONS. OKLA. 299, 331 (1950). When Congress rejected admission of the State of Sequoyah and proceeded with forming and

admitting the State of Oklahoma, the Speaker of the House of Representatives invited the leaders of the Five Tribes to file a "protest against joint statehood." *Governor Haskell Tells of Two Conventions*, 14 CHRONS. OKLA. 187, 203 (1936). In keeping with the agreement they had entered into, they declined and informed the Speaker that "if Congress would not give them separate statehood they would be satisfied with single statehood." *Id.*

The founding fathers of the new State of Oklahoma recognized that the role of the people of the Five Tribes in the formation of the State was highly unique and important. And as a lasting tribute, they included a provision in the Oklahoma Constitution creating the Great Seal of the State of Oklahoma comprised of a five-pointed star emblazoned with the ancient seals of each of the Five Tribes:



See OKLA. CONST. art. VI, § 35. Fittingly, this design was adapted from the seal designed at the Sequoyah Convention to represent the proposal of the leaders of the Five Tribes which paved the path Congress later followed:

See 1 OKLAHOMA RED BOOK 667–668 (1912).

Thus, Congress selected a respectful and lawful method to achieve both statehood for Oklahoma and the admission of the members of the Five Tribes as fully part of American life in a State they played a key role in founding. Congress did not fail to achieve its ends simply by choosing this unique legal approach over other less respectful means.

II. The State of Oklahoma's assumption of jurisdiction and exercise of dominion and sovereignty for over a century confirms the abrogation of prior treaty provisions reserving land to tribal governments.

Under the Court's precedents, a sovereign State's long-standing assumption of jurisdiction is "entitled to considerable weight." *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 n.28 (1977) ("A showing of long-standing assumption of jurisdiction is, in the related area of state boundary disputes, entitled to considerable weight."). This is particularly true where, as here, the State demonstrates its intent to assume jurisdiction by exercising significant dominion and sovereignty over an area such as where a State holds elections, assesses and collects taxes, constructs highways and public buildings, enforces state laws, or establishes a state police force, to name just a few examples. *See, e.g.*, *Rhode Island v. Massachusetts*, 45 U.S. 591, 638 (1846) (Massachusetts "claimed and took possession" and "steadily maintained" disputed area for more than two centuries); *Louisiana v. Mississippi*, 202 U.S. 1, 55, 57 (1906) (Louisiana exercised "complete dominion" over disputed area, including creating a police force); *Michigan v. Wisconsin*, 270 U.S. 290, 306–07 (1926) (Wisconsin assessed and collected taxes, constructed highways and public buildings, held elections, and enforced state law); *Massachusetts v. New York*, 271 U.S. 65, 95–96 (1926) (New York exercised dominion and sovereignty over disputed area for almost 150 years); *Arkansas v. Tennessee*, 310 U.S. 563, 567 (1940) (residents of disputed area voted in Tennessee

elections, paid Tennessee taxes, obtained Tennessee marriage certificates, were mandated to perform road work under Tennessee authority, and were educated by Tennessee public schools). The State of Oklahoma has consistently exercised all of these traditional state functions in all of the areas of Oklahoma that are not currently owned or held by members of Indian tribes or tribal governments.

Indeed, the State has prosecuted major crimes involving members of Indian tribes in its jurisdiction for the last 111 years. Pet'r's Br. 3. Meanwhile, the federal government has not tried one single criminal case involving an Indian on the theory that Oklahoma is a reservation since the State's creation. *Id.* These facts alone demonstrates a long-standing assumption of jurisdiction and uncontested exercise of dominion and sovereignty that is highly indicative of what Congress intended and what Congress did.

This Court's decision in *Solem* is inapposite. There, the state and federal government ***both*** had exerted criminal jurisdiction over major crimes involving members of Indian tribes in the disputed area—an entirely different situation than the present case where the State of Oklahoma alone has exercised full criminal authority in all areas of the State that are not owned or held by members of Indian tribes or tribal governments.

Likewise, this is not a case of mere salutary neglect by a tribal government and inconsequential inclusion of a small village within the wider regulatory ambit of a State as the Court addressed in *Nebraska v. Parker.*

A quaint little town such as Pender, Nebraska, can easily escape the notice of a rightful tribal authority for decades and also avoid giving any person or entity a vital and pressing interest to contest its status as either on or not on a reservation. In absolute and utter contradistinction, the vast reaches of Oklahoma which are implicated in this case have seen an uncountable number of circumstances routinely occurring from the very moment of statehood in which it would have been inconceivable for tribal governments, people accused of serious crimes, and taxpayers to fail contest the State's authority in court.

The subsequent history here cannot be reasonably explained other than by concluding that every interest concerned in the matter for decades must certainly have thought there was not even the faintest cloud of a doubt over the State's authority. This is especially probative evidence that Congress must have intended to and in fact did abrogate the prior treaty obligations that Mr. Murphy and the Tenth Circuit below rely on.

In short, while the assumption of jurisdiction may not be dispositive in all circumstances, the State of Oklahoma's uncontested exercise of dominion and sovereignty here is entitled to considerable weight. *Rosebud*, 430 U.S. at 605 n.28.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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